Income of NR agent for arranging NR Artists in India not taxable in status of 'Entertainer' under India-UK DTAA

Summary – The High Court of Bombay in a recent case of Wizcraft International Entertainment (P.) Ltd., (the Assessee) held that he assessee, an event management company, engaged the services of a non-resident agent to bring foreign artists to India. The assessee paid remuneration to the Artists and commission to the agent. It deducted tax on the amounts paid to the Artists but did not deduct tax on the commission paid to the agents. Whether the sum paid to agent could not be deemed to have arisen from the personal activities in a contracting State in status of entertainer or athlete - Held, yes - Whether commission paid to the agent was not hit by Article 18(2) of India-UK DTAA, and, therefore, income arising to agent couldn't be said to be taxable in India - Held, yes

1. This appeal challenges the order passed by the Income Tax Appellate Tribunal on 19.11.2010. The Tribunal has confirmed the order passed by the Commissioner of Income Tax (Appeals) dated 17.1.2003.

2. The substantial question of law that arises for determination and consideration is pertaining to the interpretation of Article 18 of the Double Taxation Avoidance Agreement styled as Indo-UK DTAA. It was submitted that the Income Tax Appellate Tribunal was not right in holding that the Assessing Officer unjustifiably and without any material held that the payment for reimbursement of expenses are liable for deduction of tax at source. The Assessee had not made an application under Section 195(2) of the Income Tax Act, and therefore, was required to deduct and pay the taxes on the gross amounts.

3. Reliance was paid to the findings of the Assessing Officer, the wording of clause (2) of Article 18 and the judgment of Hon'ble Supreme Court in the case of "*Transmission Corporation of A.P. Ltd.* v. *The Commissioner of Income Tax*, (1999 239 ITR 587 SC)".

4. The Assessing Officer held that the performance of the Artist was in India. The Assessee is the Event Management Company. The Assessee had engaged the services of one agent so as to bring the Artists to India. The Assessing officer held that whatever payments are made and by whatever nomenclature either to the artists or their agent are to be treated as the consideration payable to Artiste only. According to the Assessing Officer, the income of the Artiste is to be taxed in the State where the activities are being organised. Since the Artiste had performed in India and hence, income derived from that activities were taxable in India. Yet what the Assessing Officer has noted in paragraph 7 of his order is that the respondent has paid tax on the amount it claims to have been paid to the Artiste. It has not deducted/ paid the tax out of payments made to the agent or for expenses. That requires an application to be made by the Assessee under Section 195(2) of the Income Tax Act. Therefore, it is required to pay tax on the gross amounts. The Assessee was therefore treated as defaulter. The amounts that have been paid to various artists are referred and default is quantified at Rs.32,31,815/-. According to the Assessing Officer, the Assessee should have paid tax on full amount, should have filed return of income as a

representative assessee of non-resident and could have submitted the computation of income which accrues to the non-resident, because of payments. The Assessee then could have claimed refund for any tax paid in excess. Thus, it has neither paid tax on whole amount nor filed return. The Commissioner Income Tax (Appeals) held that the Assessing Officer has completely misdirected himself. The Commissioner of Income Tax (Appeals) held that there is a common practice that the amount has to be remitted in advance to incur the expenses. The copies of the invoices submitted in respect of major expenses were produced on record. Even the Artists had performed in India and for that expenses have to be incurred and reimbursement of such expenses do not constitute income derived by these artists from their personal activities so as to be taxable under Article 18 of the Indo-UK DTAA. Thus, the reimbursement of expenses is not taxable in India.

5. The HC did not accept this contention because at no stage did the revenue project that article or any of its clauses. The Tribunal has correctly understood the limited controversy. The limited controversy was with regard to reimbursement of the expenses to the performing artist. Though the performing Artist are engaged through Agent Mr.Colin Davie, they were engaged for performance in India but Mr.Colin Davie negotiated with them in terms of the authority given by the Assessee, outside India. The expenses for transfer and performance actually incurred have been reimbursed and that was one of the issues. The second one pertains to the payment made to Mr.Colin Davie. The argument was that the tax was required to be deducted for such payment and which has not been done.

6. The Tribunal has understood the controversy in the right perspective. It has referred to undisputed factual position. The appointment of Mr.Colin Davie as an agent is referred by the Tribunal in paragraph 4.2. In paragraph 4.3, further facts with regard to services rendered by the Artists in India and the remuneration paid, has been made. Thus, the Assessee paid the remuneration to the Artists, to the agent and reimbursed the expenses in connection with the visit and performance of the Artists in India. In paragraph 4.4 the Tribunal observed that the Assessee deducted tax at source and paid to the credit of the Central Government on the fees paid to the International Artists in India. The Tax was deducted at source on the payment made to Artists for performance in India but it was not deducted at source on the commission paid to Mr.Colin Davie who acted as an agent between the Assessee and the Artists performed in India. The Tribunal after reiterating this factual position referred to Article 18, the rival contentions and concluded that the payment made to the Artists, the reimbursement has been completely misconstrued inasmuch as the agreements with the Artists and the understanding with Mr.Colin Davie would indicate that the payment of commission to him is not covered by the Article in question. Mr.Colin Davie never took part in the event organised. He did not exercise any personal activities in India. Mr.Colin Davie did not act as a performing artist or entertainer, all that he was concerned are the services which were rendered outside India. He contacted the Artists and negotiated with them for performance in India in terms of the authority given by the respondent -assessee. It is in these circumstances that the Commissioner of Income Tax (Appeals) and the Tribunal arrived at the conclusion that said Mr.Colin Davie did not perform any services in India, but they were rendered

outside India. Therefore, commission income to the agent is not liable to tax in India. There was no obligation on the part of the assessee to deduct the tax at source at the time of making of payment. The issue, thus, has been examined by the Tribunal from the angle of payment of remuneration to the Artists and which services rendered by the Artists in India. In that regard, tax has been deducted at source. In so far as payment or reimbursement of expenses in connection with the visit and performance of the Artists in India, that has been dealt with by the Tribunal and it has recorded a finding of fact that the amount reimbursed to them was towards Air Travel. That was supported by the documents. On that Tax need not be deducted. The Tribunal in reversing the view taken by the Assessing Officer and upholding that of the Commissioner of Income Tax (Appeals) referred to the individual agreements. It arrived at the conclusion that the Assessing Officer's order is vitiated by conjecture and surmises. Mr.Colin Davie's income could not have been assessed to tax in India and that is the last aspect of the matter. The Tribunal, therefore, concluded that in the facts peculiar to the case of Mr.Colin Davie, Article 18 and particularly clause (2) is not attracted. The finding of fact which is rendered is that the income of Mr.Colin Davie has not been arising from the personal activities in a contracting status of entertainer or athlete. The payment in relation thereto is not in terms of clause (2) of Article 18. It is in these circumstances that Mr.Colin Davie's commission income cannot be said to be taxable in India. This clause was not applicable to him. Thus, the findings of fact and which are imminently possible in the given facts and circumstances, do not raise any substantial question of law. Any wider or larger controversy need not be addressed once this conclusion is reached.

7. The appeal, therefore, does not raise any substantial question of law. It is accordingly dismissed.