

Income earned by foreign co. was business profit and it wouldn't be taxable as foreign co. had no PE in India: HC

Summary – The High Court of Bombay in a recent case of Fag Kugelfischer Georg Schafer KGAA., (the Assessee) held that where assessee foreign company received fee from Indian company, said fee was to be considered as commercial profits pursuant to DTAA between them and as assessee had no PE in India, same could not be taxed in India

ORDER

1. The Income Tax Appellate Tribunal, Bench at Bombay, referred the following questions for opinion and answer:—

- "(i) Whether on the facts and in the circumstances of the case and on a construction of the agreement dated 29th January, 1972 the Tribunal was justified in holding that the consideration receivable from Precision Bearings India Limited in terms of clause 17 of the agreement was mainly in the nature of royalty and chargeable to tax under section 9(1)(vi) of the Income Tax Act, 1961?
- (ii) Whether on the facts and in the circumstances of the case and on a construction of the agreement dated 18th August, 1979 the Tribunal was justified in holding that the consideration receivable from Precision Bearings India Limited in terms of clause 15 of the agreement was mainly in the nature of royalty and chargeable to tax under section 9(1)(iv) of the Income Tax Act, 1961?
- (iii) Whether on the facts and in the circumstances of the case and on a construction of the agreement dated 3rd August, 1981, the Tribunal was justified in holding that consideration receivable from Precision Bearings India Limited in terms of clause 13 of the agreement was mainly in the nature of royalty and chargeable to tax under section 9(1)(vi) of the Income Tax Act, 1961?
- (iv) Whether on the facts and in the circumstances of the case, the Tribunal was justified in apportioning only 80% of the consideration receivable in terms of clause 17 of the agreement dated 29th January, 1972, clause 15 of the agreement dated 18th August, 1979 and clause 13 of the agreement dated 3rd August, 1981 as being in the nature of fees for technical services?

- (v) Whether on the facts and in the circumstances of the case, the Tribunal ought to have held that the consideration receivable in terms of clause 17 of the agreement dated 29th January, 1972, clause 15 of the agreement dated 18th August, 1979 and clause 13 of the agreement dated 3rd August, 1981 were "Industrial or Commercial Profits" within the meaning of the Article III (sic) of the Agreement for Avoidance of Double Taxation between India and the Federal German Republic, and were therefore not liable to be taxed in India, the assessee company having no permanent establishment in India?"
- 2.** When this matter was placed before HC, learned counsel, appearing for the Assessee submitted that the questions as formulated by the Tribunal are pertaining to assessment year 1981-82. In relation to this very Assessee for the assessment years 1982-83 and 1983-84, identical questions were referred for opinion and answer of this Court in Income Tax Reference No.145 of 1996. He sought time to produce a copy of the order passed in this Income Tax Reference by this Court on 1st August, 2014 and equally, the judgment relied upon therein. That is in the case of *CIT v. Siemens Aktiengesellschaft* [2009] 310 ITR 320 (Bom.).
- 3.** Both sides agreed before us that our opinion and answer to question No.5 reproduced above would answer all the questions. In relation to that question No.5 he has invited our attention to the statement of facts. He submits that the Assessee is a non-resident company incorporated in West Germany and derived income in the relevant previous year by way of fees from Precision Bearings India Limited. This income was derived pursuant to agreements dated 29th January, 1972, 18th August, 1979 and 3rd August, 1981, the taxability of the income derived in such agreements is governed, apart from the provisions of the Income Tax Act, 1961 also by an agreement for Avoidance of Double Taxation between Government of India and Federal Republic of Germany. The recipient of the income did not have permanent establishment in India. It is in these circumstances that the Tribunal has referred the question and to seek a answer as to whether the amount received would fall within the purview of the term 'Royalty' used in para 5 Article III (sic) of this Double Taxation Avoidance Agreement. The Tribunal took the view that 80% of the amount is taxable as royalty.
- 4.** The same issue and in connection with the same Assessee arose for determination for the assessment year 1979-80 in the reported judgment and the same has been answered in favour of the Assessee and against the Revenue.
- 5.** In the light of the fact that answer to question No.5 is already given by the aforesaid order and reported judgment that we are of the opinion that the present Reference can be disposed of in identical terms. It is accordingly disposed of.