THE CHAMBER'S

INTERNATIONAL TAX JOURNAL

MARCH - 2025| CTCITJ. VIII | NO. 3

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A Quarterly Journal of
THE CHAMBER OF TAX CONSULTANTS

Contents

March

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March, 2025 | CTCITJ.VIII | No. 3 (2025)

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US$ 100 annually (4 Journals) plus taxes & postage
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Printed by : Finesse Graphics & Prints Pvt. Ltd., Mumbai • Tel.: (91-22) 4036 4600 • Fax: (91-22) 2496 2297

From the President and Editor

It gives us great pleasure to present the 3rd Edition of Vol. VIII of the Chamber's International Tax Journal. This is the 8th year of publication of this Journal which brings to you the very latest developments in international taxation. Within a relatively short time of eight years, this Journal has created an enviable niche for itself by being well accepted by the professional fraternity and industry.

The 2nd Edition of Volume VIII (Dec. 2024) was focused on GAAR and SAAR with domestic as well as international coverage. It provided a lucid coverage of history of GAAR in India, existing GAAR & SAAR provisions and the interplay between GAAR and SAAR with analysis of key jurisprudence. It explained GAAR and SAAR type mechanisms under tax treaty such as the Principal Purpose Test ('PPT') and Beneficial Ownership Test, both in nature of general anti-avoidance provisions and Limitation on Benefits, Anti-hybrid Instrument Rules and Anti-triangulation cases which are specific anti-abuse provisions. It also dealt with OECD Articles and Commentary on anti-abuse provisions in the treaty including the Simplified Limitation-On-Benefits (SLOB) provisions as deliberated under the BEPS Action Plan 6. Alternative methods of combating tax avoidance adopted by different countries such as USA, UK, Australia, Germany, Singapore and UAE were also discussed.

In this March 2025 Edition (No. 3 Vol. VIII), we are focusing exclusively on international landmark jurisprudence of global significance with unique India perspective of such international court decisions.

Chapter 1 analyzes a recent ruling of the Swedish Supreme Administrative Court in the case of AB vs. Swedish Tax Agency which involves issues relating to corresponding transfer pricing adjustments. This article proceeds to delve deep into the controversy of divergent views being taken by contracting states in relation to a transfer pricing adjustment, and how the three objectives of tax treaties (i.e., avoiding double-taxation, ensuring a fair allocation of tax base, and implementation in good faith) can be harmonized. Relevant Indian perspective with jurisprudence are also discussed.

Chapter 2 dissects the ruling of the UK Court of Appeal in Refinitiv Limited and affiliates (including Thomson Reuters Corporation) v HMRC which addresses the intersection between traditional transfer pricing rules—particularly the use of Advance Pricing Agreements (APAs)—and newer anti avoidance regimes such as Diverted Profits Tax (DPT) which was introduced in the UK in 2015 to target perceived profit diversion to low-tax jurisdictions. The article explains and proceeds to conclude that APAs, though very useful, are not absolute shields against tax authority challenges—particularly if their validity period expires or new legal frameworks (like GAAR) empower authorities to pursue novel theories of profit reallocation.

Chapter 3 analyzes the judgment of the French Supreme Court in the case of France vs Foncière Vélizy Rose which provided interpretations, in the context of tax treaties, on the beneficial ownership requirement that European Union (EU) parent companies must fulfil to benefit from a withholding tax exemption on dividends distributed by their French subsidiaries. The Indian perspective of the decision is also lucidly explained by analyzing withholding tax provisions under domestic law as well as implications for beneficial ownership under tax treaties.

Chapter 4 analyzes the Australian Federal Court's verdict in the case of Australia vs Oracle Corporation Australia Pty Ltd which focused on the legal and practical consequences of granting or refusing stay on domestic proceedings to allow MAP and potential arbitration to continue, the interpretive approach to the MLI and DTAA, and the public interest implications involved in resolving the core dispute. The Indian perspective is discussed by analyzing the CBDT's Guidance on MAP in the context of appeal before ITAT.

The final Chapter 5 discusses the judgment of the European Court of Justice on a request made by the Belgian Constitutional Court in domestic proceedings brought before it challenging the validity of Belgian law (on the grounds of equality, right to privacy, etc.) adopting EU's directive on reporting obligations for intermediaries to inform tax authorities of certain cross-border arrangements that could potentially be used for aggressive tax planning.

I take this opportunity to thank to all the eminent authors in contributing to this 3rd Edition of Vol. VIII of the International Tax Journal.

Vijay Bhatt	**Paresh Shah**
President	*Editor*

Practical and jurisprudential hurdles in claiming Corresponding Adjustment – A review of AB vs. Swedish Tax Agency

*Ashish Mehta, Advocate** *Anuraag Bukkapatnam, Advocate **

1 INTRODUCTION

The avoidance of double taxation of income is among the primary objectives of a tax treaty. At the same time, tax treaties also strive to ensure a fair allocation of tax base between the contracting states. Tax treaties, being agreements between sovereign nations, are also required to be interpreted and implemented in *good faith*. These three features of tax treaties (i.e., fair allocation of tax base, avoiding double-taxation, and implementation in good faith) can be seen in the design of Article 9 *(Associated Enterprises)* of the **Organisation for Economic Co-operation and Development** ("OECD") model tax convention.

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Article 9 seeks to ensure that transactions between related parties (formally termed 'associated enterprise') take place at an arm's length price (**"ALP"**) as though the enterprises were dealing with unrelated parties. This Article enables contracting states to adjust the profits earned by enterprises in their transactions with associated enterprises to reflect a fair allocation of tax bases. For example, in case of an excessive interest payment by an enterprise to its overseas associated enterprise can be restricted by the source country, thereby increasing the taxable profits of such enterprise. This is in line with the objective of a fair allocation of tax base between the contracting states.

However, if the other contracting state were to not provide an adjustment to the associated enterprise by reducing its taxable income (referred to as *corresponding adjustment*), the same would result in a double taxation of income wherein the associated enterprise pays tax on the entire interest income despite the payor enterprise not receiving a full deduction of the same. In order to avoid such a scenario, Article 9(2) provides that a contracting state '*shall*' make a corresponding adjustment to the profits of the associated enterprise.

What happens, however, when both contracting states differ on whether the transfer pricing adjustment made in the source jurisdiction is appropriate? In this regard, the OECD prescribes that contracting states implement and interpret the treaty in *good faith* and resolve the issue through a bilateral dialogue (in the form of the *mutually agreed procedure* or "**MAP**").

This article delves deeper into the controversy of divergent views being taken by contracting states in relation to a transfer pricing adjustment, and how the three aforementioned objectives of tax treaties (i.e., avoiding double-taxation, ensuring a fair allocation of tax base, and implementation in good faith) can be harmonized. In particular, we examine how a contracting state should approach the issue of corresponding adjustments, and the degree to which they can challenge the views adopted by the contracting state. The article begins by engaging with a recent ruling of the Swedish Supreme Administrative Court ("**SAC**") in the case of *AB vs. Swedish Tax Agency*[1] on this issue and proceeds to evaluate how this can be relevant from an Indian perspective.

For ease, the contracting state making the primary adjustment is referred to as *'Primary State'*, and the state required to make the corresponding adjustment is referred to as *'Secondary State'*.

2 AB VS. SWEDISH TAX AGENCY

The case at hand concerns the tax treaty between Sweden and the Nordic countries. The taxpayer, a Swedish resident entity ("**Taxpayer**"), earned interest income from its associated enterprise in Norway. While the interest income of the Taxpayer was subject to tax in Sweden, Norwegian tax authorities made a transfer pricing adjustment to the Norwegian associated enterprise by limiting the amount of interest deduction. The Taxpayer accordingly sought a secondary adjustment in Sweden on account of the primary adjustment by Norwegian tax

1. Case No 1348-24 1349-24.

authorities. Article 9 of the tax treaty between Sweden and the Nordic countries is similar to Article 9 of the OECD model convention.

The Swedish tax authorities refused to grant such corresponding adjustment, as they were of the opinion that the Norwegian primary adjustment was not in accordance with the arm's length principle. This decision was appealed by the Taxpayer before the Swedish Administrative Court, which ruled in favour of the Taxpayer and allowed the corresponding adjustment. The Swedish tax authorities further appealed this decision before the Administrative Court of Appeal, which held that as per the tax treaty, it is only the 'competent authority' (i.e., the Swedish tax authorities) who can determine what the correct ALP should have been in consultation with the competent authority of the other contracting state. Courts in Sweden (such as the Swedish Administrative Court) did not have the authority under the tax treaty to examine the correct ALP for the transaction. Consequently, the Court held that such income could not be exempt from tax in Sweden.

The Taxpayer filed an appeal against such decision before the SAC, the apex Swedish court for administrative matters. In a short ruling, the SAC affirms that Sweden is bound by international law (as contained in the tax treaty) and that the provisions of the tax treaty would prevail over domestic law. The SAC acknowledges that while providing a corresponding adjustment, Swedish tax authorities could evaluate whether the primary adjustment was justified, both in principle and in terms of amount. However, ruling in favour of the Taxpayer, the SAC holds that the Swedish Administrative Courts are not precluded from determining whether the primary adjustment was *justified*. Therefore, as the Administrative Court in this case had given its ruling without evaluating whether the primary adjustment by Norwegian tax authorities was justified, the SAC remanded the matter back to the Administrative Court to give a finding on the same.

Although a short ruling, this ruling highlights the practical as well as jurisprudential hurdles that taxpayers may face while seeking a corresponding adjustment. The ensuing paragraphs delve deeper into this controversy.

3 JURISPRUDENTIAL HURDLES

This segment deals with the key legal issues that arise when the Secondary State tax authorities refuse to provide corresponding adjustment on the ground that the primary adjustment is not justified.

3.1 Divergence of opinion – how to navigate?

Under Article 9(2) of the OECD Model Convention, while providing a corresponding adjustment, a contracting state is required to have regard to the other provisions of the convention. However, the convention does not prescribe any specific standard for evaluating whether a primary adjustment is in accordance with the arm's length principle. While the OECD transfer pricing guidelines can serve as a common standard for evaluating the ALP of a transaction, the same is not 'binding' on the contracting states.[2]

2. *CITI vs. Cushman and Wakefield (India) (P.) Ltd., [2014] 46 taxmann.com 317 (Delhi).*

The OECD commentary states that a contracting state is not obligated to automatically provide a corresponding adjustment simply on account of profits increasing due to a primary adjustment. Rather, the contracting state providing corresponding adjustment must also regard the primary adjustment as being 'justified' in principle as well as the amount.[3]

In examining corresponding adjustment, the competent authorities of both states may consult each other as well. However, the MAP procedure can be quite time consuming and laborious, with no assurance of a conclusive determination either. Therefore, sole reliance on consultations between competent authorities may not serve the purpose of achieving certainty in taxation and a time-bound resolution of tax disputes.

That said, the competent authorities cannot be said to have an unfettered discretion in denying a corresponding adjustment. As per the text of the model convention, a contracting state 'shall' provide a corresponding adjustment. This means that the Secondary State is mandatorily obligated to provide a corresponding adjustment, and the same cannot be denied unless the Secondary State can adequately demonstrate that the Primary State was not justified in making the primary adjustment.

It is in this context that the principle of *good faith* becomes paramount. While there is a dearth of precedents dealing with corresponding adjustments, reliance can be placed on certain judicial precedents in the context of foreign tax credits **("FTC")** (discussed in the ensuing paragraph).

3.2 FTC – limited discretion

In the case of *Amarchand & Mangaldas & Suresh A. Shroff & Co. vs. ACIT*[4] **("Amarchand Mangaldas")**, the Mumbai bench of the Income Tax Appellate Tribunal **("ITAT")** was called upon to evaluate whether an Indian taxpayer could claim FTC in India for taxes withheld on its income (in the nature of professional fees) in Japan as per Article 12 of the India-Japan tax treaty. Article 23(2)(a) of the India-Japan Tax Treaty provides that when an Indian resident derives income from Japan which, *'in accordance with the provisions of the Tax Treaty'* is taxable in Japan as well, India is required to allow such taxpayer a FTC to the extent of taxes paid in Japan.

Tax authorities in the said case denied FTC by alleging that the tax withheld in Japan was not withheld in accordance with the India-Japan Tax Treaty. In particular, the tax authorities held that the applicable provision of the India-Japan Tax Treaty was Article 14 of the treaty (dealing with 'Independent Personal Services') rather than Article 12 (dealing with 'fees for technical services).

The ITAT noted that it was open to Indian tax authorities to determine whether taxes withheld in the contracting state were in harmony and in conformity with the provisions of the tax treaty. If such withholding is not in harmony with the tax treaty, the tax authorities could deny the FTC as well. However, the ITAT ruled

3. Paragraph 6 of the OECD Commentary (2017) to Article 9.
4. [2023] 154 taxmann.com 99 (Mumbai - Trib.).

in favour of the taxpayer and held that Article 14 and Article 12 of the tax treaty had an overlapping scope, and therefore the withholding of tax in Japan could not be said to be unreasonable or incorrect.

The ITAT significantly goes on to observe that while evaluating whether tax has been withheld 'in accordance with the convention', one has to take a judicious call as to whether the view so adopted by the source jurisdiction is a reasonable and bona fide view, which may or may not be the same as the legal position in the residence jurisdiction. The ITAT acknowledges that there can be differences in interpretation between the contracting states, and that such a difference in interpretation can create incongruity and cause undue hardship to the taxpayers. In the interest of certainty, and keeping in mind the principles of sovereignty, the ITAT notes that FTC cannot be denied when the contracting state has adopted a 'reasonable' or 'bona fide' view. It is only when tax authorities demonstrate that such view is *'manifestly erroneous'* that FTC can be denied.

Relying on the aforementioned ruling, ITAT Delhi in the case of *Dynamic Drilling & Services vs. ACIT*[5] **("Dynamic Drilling")** held that FTC cannot be denied merely because in all cases in which the interpretation of the residence country about the applicability of a treaty provision is not the same as that of the source jurisdiction about the provision and yet the source country levied taxes whether directly or by way of tax withholding, FTC cannot be declined.

3.3 Sovereignty and international taxation

The issue regarding whether Indian tax authorities can step into the shoes of foreign tax authorities has also been examined by Indian courts in the context of 'tax residency certificates'. In the landmark ruling of *Serco BPO vs. AAR*[6] **("Serco BPO")**, the Punjab and Haryana High Court was called upon to evaluate a taxpayer's entitlement to benefits under the India-Mauritius Tax Treaty. The Court ruled in favour of the taxpayer and granted relief under the treaty by, *inter alia*, relying on the Tax Residency Certificate **("TRC")** furnished by the taxpayer which was issued by the competent Mauritian tax authorities.

Relying on the Supreme Court's ruling in *Union of India vs. Azadi Bachao Andolan*[7], the High Court recognized the fact that a tax treaty was entered into between two Sovereign States and a refusal to accept the validity of a certificate issued by the contracting States would be contrary to the convention and constitute an erosion of the faith and trust reposed by the contracting States in each other. Therefore, the High Court held that once it is established that the TRC has been issued by the concerned authorities in Mauritius, a failure to accept the TRC would be an indication of a breakdown in the faith reposed by the Government of India in the Government of Mauritius and the Mauritian authorities. The observations of the High Court have been affirmed in several subsequent rulings as well[8].

5. [2022] 140 taxmann.com 102 (Delhi - Trib.)
6. [2015] 60 taxmann.com 433 (Punjab & Haryana)
7. [2003] 132 Taxman 373 (SC)
8. *Norwest Venture Partners vs. DCIT, [2024] 160 taxmann.com 632 (Delhi - Trib.); BG Asia Pacific Holding (Pte.) Ltd., In re vs. [2021] 125 taxmann.com 2 (AAR - New Delhi).*

The binding nature of a TRC and the degree of faith to be reposed in contracting states is presently being considered by the Supreme Court in the SLP filed against the Delhi High Court's ruling in Tiger Global International Holdings[9].

3.4 Corresponding adjustments and good faith

Observations of the ITAT in Amarchand Mangaldas and Dynamic Drilling, and the principles of good faith elaborated by the Punjab High Court in Serco BPO should be equally applicable while evaluating corresponding adjustments under Article 9(2) as well.

Determining the ALP of a transaction can be a highly subjective exercise, with a wide range of reasonable conclusions and findings. Given such subjectivity, there is a strong likelihood that competent authorities in both jurisdictions adopt differing interpretations, both of which are reasonably accurate. In such circumstances, corresponding adjustment should not be denied merely on account of differences in interpretation. Rather, corresponding adjustment should be denied only in circumstances where the tax authorities can demonstrate that the primary adjustment is 'manifestly arbitrary'. Furthermore, initiating MAP proceedings should not be regarded as a pre-requisite for seeking a corresponding adjustment unless the tax authorities have strong grounds for regarding the primary adjustment as being manifestly erroneous.

4 PRACTICAL HURDLES

The ruling of the SAC in Swedish Tax Agency primarily concerned itself with whether Swedish Administrative Courts could also evaluate whether the primary adjustment by the Primary Jurisdiction was 'justified' in principle and quantum. In an Indian context, there would be fairly less controversy while examining whether the ITAT can examine whether the tax authorities have applied Article 9 in an appropriate manner. However, the Swedish ruling does not contain any observations regarding the procedure adopted by the taxpayer while seeking a corresponding adjustment.

Jurisprudential issues aside, taxpayers may find themselves facing several practical hurdles while seeking a corresponding adjustment as well. This segment discusses these issues.

4.1 Procedure for claiming corresponding adjustment

Chapter X of the IT Act contains the rules pertaining to transfer pricing in India. While Chapter X discusses various facets of transfer pricing at length (such as the definition of an associated enterprise, international transaction, methods for determining ALP, secondary adjustments, etc.), there is no provision that enables taxpayers to claim a 'corresponding adjustment' as referred to in various Indian tax treaties.

In this regard, *Klaus Vogel* examines the issue of whether a corresponding

9. [2024] 165 taxmann.com 850 (Delhi)

adjustment can be claimed in the absence of any enabling domestic legislation. Klaus Vogel notes that some jurists take a view that a separate procedural framework in domestic law is required in order to give effect to a corresponding adjustment. However, Klaus Vogel goes on to note that a stronger position appears to be that the provisions of Article 9(2) of the tax treaty are self-executing, and are sufficient from a substantive and procedural perspective for claiming a corresponding adjustment in the Secondary State. This is particularly so in light of the words *'shall make an appropriate adjustment'* appearing in the model convention, which demonstrates a 'mandatory obligation' on the Secondary State to provide a corresponding adjustment.

In the Indian context, Section 90(2) of the IT Act provides that where India has entered into a DTAA with any country, the provisions of the IT Act or the DTAA, whichever is more beneficial to the taxpayer, shall apply. Therefore, if the provisions of Article 9(2) are more beneficial to the taxpayer, the taxpayer should be entitled to benefits regardless of there being a procedure under domestic law for claiming such benefit. As the age-old Latin maxim goes, *Ubi jus Ibi remedium* (where there is a right, there is a remedy).

If the primary adjustment takes place within the timelines for assessment or filing of a revised return, taxpayers may be able to suo-motu make a claim for corresponding adjustment by offering lesser income to tax. However, if the primary adjustment is made at a time exceeding the time period for revising returns, taxpayers may have no mechanism to suo-motu make a claim for corresponding adjustment. The OECD commentary acknowledges this issue as well and consciously avoids dealing with this issue in the text of the OECD convention[10]. The OECD notes that contracting states may seek to address this issue bilaterally.

In such a scenario, taxpayers may consider softer approaches such as writing to the Central Board of Direct Taxes **("CBDT")** and their jurisdictional assessing officer seeking the corresponding adjustment. If relief is not forthcoming from these avenues, taxpayers may consider seeking relief from the High Courts by invoking their writ jurisdiction under Article 226 of the Indian Constitution.

4.2 Conduct of taxpayer – a relevant factor?

In the segment on jurisprudential analysis, we examined circumstances where foreign tax authorities make a primary adjustment based on their independent assessment of the transaction. However, a question arises as to whether Indian tax authorities would be bound to provide a corresponding adjustment when a foreign-associated enterprise of a taxpayer voluntarily revises their transfer pricing returns and suo-motu makes a primary adjustment. In such circumstances, a foreign tax authority has not provided its opinion on whether the primary adjustment is justified or necessary.

10. Paragraph 10 of OECD Commentary (2017) to Article 9.

However, the OECD commentary clarifies that a secondary adjustment should be granted even when a taxpayer voluntarily files a revised transfer pricing return and adopts a transfer pricing position which in their opinion is accurate. Providing a corresponding adjustment should not be predicated on tax authorities in the Primary State making the primary adjustment. As always, a difference of opinion between the competent authorities of both states can be resolved under MAP[11].

The situation can get trickier when the taxpayer claiming a corresponding adjustment in the Secondary State is also simultaneously disputing the primary adjustment in the Primary State. Tax authorities in such case may cite the taxpayer's decision to contest the primary adjustment as demonstrating the 'unjustified' nature of the primary adjustment. While this is an untested area, one may contend that there should not be any estoppel against the taxpayer from claiming a corresponding adjustment while also challenging the primary adjustment. Whether a corresponding adjustment should be allowed should be determined solely on the basis of whether the primary adjustment is 'manifestly erroneous'. If it is not erroneous, then the views that a taxpayer adopts regarding such adjustment should make no difference to the tax treatment of it in the Secondary State.

Interestingly, in the Amarchand Mangaldas ruling, tax authorities sought to rely on email correspondences between the taxpayer and the Japanese payors, where the taxpayer communicated that Article 14 should be the relevant tax treaty provisions for taxing the professional fees (which was the contention of the tax authorities in India as well). However, the ITAT nevertheless ruled in favour of the taxpayer's claim for FTC by confining itself to examining whether the approach adopted by the Japanese tax authorities was reasonable. Similar principles should guide the authorities while evaluating corresponding adjustments as well.

5 CONCLUSION

We began this article by referring to the three objectives of tax treaties – good faith, elimination double taxation, and fairness. In the context of corresponding adjustments, the best way of balancing these three objectives is adopting the test of manifest absurdity. Therefore, unless the tax authorities of the Secondary State can demonstrate that the primary adjustment is absurd, the taxpayer should be obligated to provide corresponding adjustment. Invocation of mutual agreement procedure should not be a prerequisite for seeking a corresponding adjustment, neither should an absence of procedural provisions under the IT Act disentitle taxpayers from claiming corresponding adjustments.

11. See also, Chapter 31, *"Corresponding Adjustments"*, The Oxford Handbook of International Tax Law, Oxford University Press, (2023).

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REFINITIV AND OTHERS (Thomson Reuters) vs The UK (HMRC) - 2024

CA Akshay Kenkre *

1. BACKGROUND AND SYNOPSIS:

On 15 November 2024, the Court of Appeal (Civil Division) delivered its much-anticipated judgment in *Refinitiv Limited and affiliates (including Thomson Reuters Corporation) v HMRC ([2024] EWCA Civ 1412).* At its core, this case addresses the intersection between traditional transfer pricing rules—particularly the use of Advance Pricing Agreements (APAs)—and newer anti-avoidance regimes such as Diverted Profits Tax (DPT). DPT, introduced in the UK in 2015, targets perceived profit diversion to low-tax jurisdictions. The *Refinitiv* case concerned whether an expired APA from 2013 could shield the taxpayer from HMRC's application of DPT for the 2018 tax year.

The case is notable for holding that an APA, which is valid only for certain agreed chargeable periods, cannot be retroactively (or even prospectively) extended beyond its explicit term—even if the underlying transactions continue into later periods. In *Refinitiv's* case, HMRC had issued DPT notices amounting to over GBP 167 million for the 2018 tax period, asserting that the group's profits in the UK were understated under a Transactional Net Margin Method (TNMM) approach and that a profit-split method more accurately reflected value creation.

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The Court of Appeal's decision reaffirmed two critical points:

- **Temporary scope of APAs**: APAs are confined to the specific periods for which they are negotiated and cannot be stretched to subsequent tax years.

- **Autonomy of DPT**: DPT constitutes a distinct statutory framework, separate from transfer pricing provisions, giving HMRC the freedom to apply new methodologies (such as profit-split) in later periods—even where an older APA used TNMM.

For practitioners and multinational enterprises, the takeaway is that the transition between older, agreed-upon transfer pricing frameworks and newly introduced anti-avoidance regimes requires vigilance. Where an APA has expired, taxpayers cannot assume it will continue to govern subsequent disputes under newer legislative regimes.

From an Indian perspective too, the case is important from a point of view of regularly updating and testing the transactions covered by an APA. While India does not impose a DPT-equivalent tax, it does have a General Anti-Avoidance Rule (GAAR) framework, an extensive transfer pricing regime under the Income-tax Act, 1961, and an evolving APA program. The *Refinitiv* judgment spotlights the risk of relying on outdated transfer pricing agreements in a rapidly shifting tax environment, a lesson equally pertinent in India.

2. IMPORTANT DEFINITIONS OF THE TERMS / EXPRESSIONS USED IN THE ARTICLE

2.1. Advance Pricing Agreement (APA)

An APA is a contract between a taxpayer and a tax authority determining the future application of transfer pricing methodology to specified transactions, usually over a fixed period. In the UK (and similarly in India under the Income-tax Act, 1961), APAs are designed to provide certainty and avoid protracted litigation.

2.2. Diverted Profits Tax (DPT)

Introduced in the UK in 2015, DPT targets tax avoidance by multinational enterprises, particularly where profits are perceived to be "diverted" away from the UK tax base. It generally imposes a higher tax rate (25% in the UK context) on profits that HMRC deems artificially shifted out of the UK. It is divided into two parts, predominantly covering "avoidance of Permanent Establishments" and "Profit Shifting", both targeted towards significant economic substance.

2.3. Economic Substance

A principle that examines the real economic activities undertaken by entities, beyond mere legal form. In the context of transfer pricing and anti-avoidance rules, "economic substance" determines whether each entity involved in a transaction truly performs the key value-creating functions and assumes corresponding risks.

3. Core issue and the verdict by the Court of Appeal

3.1. Knowing the Past - Advance Pricing Agreement (APA) with Thomson Reuters/Refinitiv:

In 2013, several UK entities within the Thomson Reuters group (later associated with Refinitiv) entered into an APA with HMRC. This APA covered the chargeable periods from 2008 to 2014 and established the Transactional Net Margin Method (TNMM) as the primary method for determining arm's length remuneration for a range of intra-group services. In broad terms, the APA sanctioned a cost-plus markup (ranging from 6% to 15%) to be applied to the relevant operating costs of the UK entities.

The approval of a TNMM-based markup signified that the UK entities were characterised as routine or limited-risk service providers. Typically, this suggests that the local subsidiaries in the UK were not attributed substantial intangible assets or assumed extensive business risks. Instead, they performed support or back-office functions for the broader group and thus received stable, relatively predictable returns based on costs incurred.

3.2. The period after 2014:

The 2013 APA concluded at the end of the 2014 tax period. After this date, the group did not implement a renewed APA or negotiate any other formal agreement with HMRC for subsequent chargeable periods. For those of us advising on transfer pricing strategy, this scenario flags a key vulnerability: when an APA expires, the certainty that it previously conferred also lapses. Thus, from 2015 onward, the UK entities were left to rely on general transfer pricing rules and any relevant anti-avoidance legislation in force at the time.

In parallel, there was a global shift in attitudes toward multinational tax planning. Politically, the base erosion and profit shifting (BEPS) movement had gained traction worldwide, leading to increased scrutiny from tax authorities regarding the alignment (or misalignment) between value creation and profit allocation. While the Thomson Reuters group had presumably complied with the APA in the earlier years, the tax environment post-2014 was undeniably more aggressive, making it less likely that older cost-plus models would go unchallenged—particularly when they potentially overlooked significant intangible contributions or high-value functions in the UK.

3.3. Introduction of DPT

Enacted via the Finance Act 2015, DPT is designed to counteract aggressive tax planning by multinational enterprises. It imposes a higher tax rate (25%, compared to the standard corporate tax rates in the UK of 19% or 20% at the relevant times) on "diverted" profits that HMRC deems insufficiently reflected in the UK tax base.

From a transfer pricing and international tax advisory perspective, DPT operates on a distinct statutory basis and includes an economic substance analysis that extends well beyond the application of standard transfer pricing methodologies. While DPT often uses conventional transfer pricing principles as a starting point, it provides HMRC with broader discretion to recast or challenge intercompany transactions if they perceive that profits linked to UK activities are being inappropriately shifted overseas.

DPT generally applies in two key scenarios:

- **Artificial Avoidance of Permanent Establishment (PE):** This occurs when an MNE avoids creating a taxable presence in a jurisdiction while maintaining substantial economic activity there.
- **Profit Mismatch Arrangements:** These involve transactions where the economic benefits do not align with the commercial substance, often exploiting differences in tax regimes.

3.4. The genesis of dispute:

Against this backdrop, once the 2008–2014 APA expired, HMRC began scrutinizing the post-2014 transfer pricing outcomes achieved by the UK entities. Specifically, for the 2018 tax year, HMRC concluded that the previously used **cost-plus** approach (TNMM) materially understated the profitability of the UK affiliates. In the revenue authority's estimation, the UK units contributed more to the group's overall value creation than the routine service characterization implied. Intellectual property (IP) development, intangible asset management, and risk-bearing activities were believed to be more centralized in the UK than was disclosed under the old APA framework.

Consequently, HMRC decided to **issue DPT notices** to the Refinitiv group in respect of the 2018 period. By applying a **profit-split** method—often employed in cases where intangible assets or high-value functions are distributed among group entities—HMRC arrived at a much higher allocation of group profit to the UK than under the old cost-plus margin. The net effect was a series of assessments totaling over £167 million.

Refinitiv challenged these notices, contending that the earlier APA's TNMM-based returns should continue to be determinative, particularly because the services and assets at issue were originated or developed while the APA was still in effect (i.e., 2008–2014). This dispute ascended through the UK's tribunal system, eventually reaching the Court of Appeal (Civil Division), which delivered its final judgment in November 2024. The case is currently before the Supreme Court for the final verdict.

Refinitiv took the position that the **APA's pricing methodology** (i.e., TNMM with a 6% to 15% cost-plus markup) continued to reflect the economic reality of the UK operations. While the APA explicitly ended in 2014, the group argued that the relevant services and intangible assets being compensated in 2018 were substantially the same as those covered under the APA. From Refinitiv's vantage point, the conclusion that TNMM sufficiently captured the arm's length standard did not lose its validity simply because the APA had expired.

Critically, **Refinitiv cited Section 220** of the Taxation (International and Other Provisions) Act 2010 (TIOPA) in support of its argument that APAs could still be relevant to subsequent years if the underlying transactions were "related" to the APA period. The taxpayer contended that because the cost-plus approach had been validated for services of a similar character, the assessment for 2018 profits diverging from that approach was both unfair and contrary to the broader spirit of consistency in transfer pricing.

From HMRC's standpoint, the APA's legally binding scope did **not** extend beyond its stated term (2008–2014). Once the APA expired, HMRC believed it had no further obligation to adhere to the cost-plus returns, especially in light of legislative changes such as DPT. Additionally, the new evidence regarding the UK entities' actual functional, asset, and risk profiles (particularly in relation to intangible assets) led HMRC to conclude that a **profit-split method** was more aligned with the economic substance of the UK's contributions in 2018.

Furthermore, HMRC emphasized that the **Diverted Profits Tax** is a distinct statutory mechanism, not a mere extension of traditional transfer pricing rules. While DPT often overlaps conceptually with transfer pricing, it incorporates additional factors to assess whether profits were artificially diverted away from the UK. For that reason, HMRC was adamant that they had broad discretion under DPT to choose a methodology that properly aligned taxable profits with the UK's actual contribution. The older APA framework, tied specifically to the periods 2008–2014, could not curtail this statutory authority.

4. COURT'S VERDICT

After progressing from the First-tier Tribunal to the Upper Tribunal, the case arrived at the Court of Appeal (Civil Division). In **November 2024**, the Court of Appeal upheld the rulings of the lower tribunals, effectively endorsing HMRC's stance.

4.1. APA's temporary nature and limitation

The Court of Appeal placed significant emphasis on the fact that **APAs are inherently time-bound**. By design, these agreements delineate specific chargeable periods for which the agreed transfer pricing method has binding effect. Once the period ends, the APA cannot be retroactively or implicitly prolonged to subsequent years unless explicitly negotiated and renewed. The Court took a relatively strict interpretative approach, concluding that no statutory provision (including Section 220 TIOPA) compelled HMRC to maintain the same methodology after the APA's expiration.

From a technical perspective, the Court aligned with the concept that **each chargeable period is assessed on its own merits.** Tax advisors are accustomed to this principle: every year stands alone, and while prior agreements can shed light on factual continuity, they do not create indefinite obligations unless the terms explicitly say so. Thus, the fact that the services at issue had begun during the APA's validity did not override the principle that the APA had a formal end date.

4.2. Annual Nature of Corporation Tax

Reinforcing the temporary nature of the scope of the APA, the Court held that the corporate tax positions and exercise is an annual affair. APA being an agreement, the validity of the same expired in the year where the notices for DPT were served. As a result, an expired agreement cannot fetter HMRC's statutory powers for a future year—particularly a future year subject to new anti-avoidance laws like DPT.

4.3. DPT is a separate legal framework

The Court also concurred with HMRC that **DPT** is not merely an adjunct to conventional transfer pricing rules but rather a **separate anti-avoidance regime** with its own legislative architecture. Where **DPT** applies, HMRC is empowered to depart from earlier approaches if those approaches no longer capture the true economic substance of a taxpayer's UK activities.

To Sum it up - In line with the above findings, the Court of Appeal ruled in favor of HMRC, confirming the validity of the DPT notices issued to Refinitiv for the 2018 tax year and rejecting the taxpayer's reliance on the expired APA.

5. WAS THIS DECISION EXPECTED OR CONTROVERSIAL?

From a purely technical and doctrine of tax interpretation perspective, the decision of the court has merits, and many of the professionals found the outcome in line with the expectations. Once an APA expired, the taxpayer always had the option to renew the APA in future years, given the similar facts of the case. The decision to not renew the APA for the taxpayer does not look like a well-thought-out tax strategy, especially when the DPT came around 2015; the taxpayer should have kept its guard up and defence strong.

From the author's point of view, if one has to look at the other side, the HMRC shifted to profit split method due to the significant contribution UK made to the entire value chain of the group. If the taxpayer mentions that there is no change in the factual pattern and HMRC builds their case on the basis of significant functions, either the signed APA or the allegation of HMRC for DPT have serious flaws in the factual pattern. In case, if it is the former one, whether HMRC in 2008 extended favourable APA to the taxpayer knowing the underlying facts? Such cases needs to be answered and well-rounded research needs to be conducted. The matter is currently much more deep-rooted and grave than what is seen on the Court's floor.

6. TAKEAWAY FOR INDIAN MULTINATIONALS AND PROFESSIONALS

India's evolving tax landscape and robust transfer pricing framework share several parallels with the UK context highlighted in *Refinitiv v HMRC*. While India does not impose a dedicated Diverted Profits Tax (DPT), it has implemented a General Anti-Avoidance Rule (GAAR) and continues to expand its Advance Pricing Agreement (APA) program. Multinationals need to keep an open eye towards renewal and deploying tax strategies that fall within the four corners of the law. If ignored or not complied with, it could lead to massive tax risks for a corporation.

The following could be certain important points for attention to be considered

6.1. **High-Risk of Relying on Expired Agreements**- A further lesson is the inherent risk in depending on an *expired* APA to ward off future controversies. Refinitiv's core argument—that the same methodology should persist for the 2018 period because the underlying services originated during the APA's term—was ultimately rejected. The Court made it clear that an agreement's influence ends on the last date it covers, and afterwards the broader statutory rules govern. In practice, this signals a warning to multinational enterprises (MNEs): if there are material business changes, legislative updates, or simply the passage of time that sees the APA expire, taxpayers must either renegotiate or update their APA. Otherwise, they risk a post-expiry examination that may lead to significant additional assessments, interest, or penalties. The risk is consistent even if it is APA or an inter-corporate agreement. Documentation in transfer pricing is everything.

6.2. **Extended Focus on Intangibles and DEMPE Functions**- On a more technical level, the case emphasises the importance of analysing intangible value drivers. When taxpayers rely on cost-plus returns, they often assume local entities undertake low-value, routine services. However, if the local entity's people functions—especially those related to the Development, Enhancement, Maintenance, Protection, and Exploitation (DEMPE) of intangibles—significantly bolster global profitability, a simplistic markup on costs can be subject to challenge. There are multiple cost centre companies in India that are remunerated on a cost-plus mark-up. As these cost centre becomes older with passage of time, they start to often assume some critical roles in the value chain, especially due to the practicalities of the situation. Such Indian cost centres may have to be looked at from an in-depth functional analysis perspective to confirm on the DEMPE position.

6.3. **Faceless nature of scrutiny** – A core principle in modern transfer pricing is extensive and contemporaneous documentation, which includes not only showing compliance with the chosen method but also justifying why that method remains appropriate when the group's operational realities evolve. While the corporation tax is already under faceless scrutiny, the transfer pricing will soon follow. This means, the opportunity to explain in -person and provide clarification through meetings or calls will seize to exist. This means the documentation prepared by the taxpayers are top-notch and ease to explain. Your transfer pricing documentation should be interesting, like a top-seller novel, and as easy as a storybook. This will help the multinational to achieve results of risk mitigation and provide shelter against aggressive tax scrutiny.

6.4. **General Anti Avoidance Rules** – While transfer pricing is a SAAR, the provisions of GAAR could be invoked even if APAs are concluded and exist at the time of raising GAAR questions. APAs generally address the application of arm's length pricing methods under standard transfer pricing rules. However, GAAR has a higher overreaching powers over and above APAs.

7. CONCLUDING THOUGHTS:

While *Refinitiv v HMRC* is a UK-specific case centring on DPT, the ruling resonates well beyond British borders. Jurisdictions worldwide are planning to introduce new taxes aimed at perceived profit diversion, digital services, or intangible-driven business models. The key takeaway is that APAs, while immensely useful, are never absolute or perpetual shields against tax authority challenges—particularly if their validity period expires or new legal frameworks (like GAAR) empower authorities to pursue novel theories of profit reallocation. MNEs should evolve their tax strategies and tighten control measures around their corporate taxation. Taxation today is not just a support function but an important partner in doing business globally.

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Proof of residency for beneficial owner is key to reap fruits of tax treaty

*CA Hiren Shah ** *CA Rakhi Modi **

"The tax on capital gains directly affects investment decisions, the mobility and flow of risk capital from static to more dynamic situations, the ease or difficulty experienced by new ventures in obtaining capital, and thereby the strength and potential for growth of the economy." John F. Kennedy

SYNOPSIS

The term 'beneficial owner' is important under the Indian income-tax law as well as for availing tax treaty (Treaty) benefits.

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Under the Indian income-tax law, the concept of beneficial ownership finds reference, amongst others, in deemed dividend provisions and under the Treaty, in the context of Articles relating to taxation of interest, dividend, royalty, fees for technical services, etc. Interestingly the said term is not defined and there are judicial precedents, both domestic[1] and international[2] which have tried to interpret the concept and provided guidance.

Furthermore, whether fulfillment of beneficial ownership requirement is implicit for availing treaty benefit, even if not explicitly provided for in the treaty provision, is a debatable issue.

Time and again the fact that whether the relevant taxpayer is beneficial owner of relevant income, has been tested to determine, amongst others, taxability of income.

In the French decision[3] discussed in this Article, the French Supreme Court provided interpretations on the beneficial ownership requirement that European Union (EU) parent companies must fulfil to benefit from a withholding tax exemption on dividends distributed by their French subsidiaries. In the context of tax treaties, the Court held that treaty benefits are implicitly available for taxpayers that are beneficial owners of dividends even if not mentioned specifically. As the recipient of dividend income was not the beneficial owner of dividend income, treaty benefit was held to be not available. A taxpayer that is the beneficial owner of an income may benefit from the treaty, even if such income was paid to an intermediary located in a third state, provided the beneficial owner proves residency. In the absence of proof of residency, taxpayers are not entitled to avail treaty benefit.

The Supreme Court of France decided the matter in favour of the Revenue and against the tax deductor, in the absence of fulfillment of the requirement of beneficial ownership by the tax deductee.

1. Facts of the case

Foncière Vélizy Rose ('FVR'), a company incorporated in France distributed interim dividend to its parent company in Luxembourg, Vélizy Rose Investment ('VRI' or 'Parent company') in 2014, without withholding taxes. The next day, VRI re-distributed dividend to its parent company, Dewnos Investment which was also incorporated in Luxembourg (Holding company). FVR claimed exemption from withholding taxes on the basis of Article 119 ter[4] of the French General Tax Code.

The French tax authorities did not consider the parent company as the beneficial owner of dividend as there was back-to-back distribution of dividend. Also, based on the finding that the parent company had no other activity other than holding shares of

1. *Golden Bella Holdings Ltd. v. DCIT [2019] 109 taxmann.com 83 (Mum); Imerys Asia Pacific (P.) Ltd. v. DDIT [2016] 69 taxmann.com 454 (Pune)*
2. *Prevost Car Inc. v. The Queen, 2009 DTC 5053 (FCA); Velcro Canada Inc. v The Queen 2012 TCC 57*
3. *France vs Foncière Vélizy Rose, November 2024, Conseil d'État, Case No 471147*
4. ter refers to third sub-article

the French company, denied withholding tax exemption to FVR, initiated withholding tax assessment and levied penalty. Both Montreuil Administrative Court and Paris Administrative Court denied FVR's claim. FVR's alternative claim of 5% withholding on dividend based on the France-Luxembourg tax treaty, was also denied by the Courts. FVR then filed appeal before the French Supreme Court.

2. Relevant provisions under the French General Tax Code and tax treaty between France and Luxembourg

2.1. Relevant provision under the French General Tax Code

Under the terms of Article 119 bis[5] 2 of the French General Tax Code, income is subject to withholding taxes when it is received by persons who do not have their tax domicile or registered office in France.

Under the terms of Article 119 ter of the said Code, the withholding is not applicable to dividends distributed to a legal entity that fulfils following conditions by a company or organisation, subject to corporation tax at the normal rate:

- the legal entity must justify to the debtor or the person who ensures the payment of this income, that it is the beneficial owner of the dividends; and
- have its effective place of management in a Member State of the European Union or in another State party to the Agreement on the European Economic Area which has entered into an administrative assistance agreement with France with a view to combating tax evasion and avoidance and not be considered, under the terms of a double taxation agreement entered into with a third State, as having its tax residence outside the European Union or the European Economic Area; (. ..).

2.2. Article 8 of France-Luxembourg tax treaty signed on 1 April 1958

"1. Dividends paid by a company which is resident for tax purposes in a Contracting State to a person who is resident for tax purposes in the other Contracting State may be taxed in that other State.

2. a) However, such dividends may be taxed in the Contracting State in which the company paying the dividends is resident for tax purposes, and according to the laws of that State, but the tax so charged may not exceed:

1. *5% of the gross amount of the dividends if the recipient of the dividends is a capital company which directly holds at least 25% of the share capital of the capital company distributing the dividends;*
2. *15% of the gross amount of the dividends in all other cases."*

Under the terms of Article 10 bis of the tax treaty:

5. bis refers to second sub-article

"In order to benefit from the provisions of Article 8, paragraphs 2, 3 and 4, (...) the person who has his tax domicile in one of the Contracting States must produce to the tax authorities of the other Contracting State a certificate, endorsed by the tax authorities of the first State, specifying the income in respect of which the benefit of the provisions referred to above is claimed and certifying that such income and the payments provided for in Article 8, paragraphs 3 and 4, will be subject to direct taxes, under the conditions of ordinary law, in the State where he has his tax domicile. / (...)".

Article 9 of France-Germany tax treaty

"(1) Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

(2) Each of the Contracting States retains the right to levy tax on dividends by way of deduction at source, in accordance with its legislation. However, such withholding may not exceed 15% of the gross amount of the dividends."

3. FVR's contentions

- First contention of FVR was that the tax authorities implicitly resorted to anti-abuse provisions for denying withholding tax exemption without following requisite tax procedures (Article L.64 of the Book of Tax Procedures)

- The second contention of the taxpayer was that the denial of exemption infringes EU freedom of establishment (Articles 49 and 54 of the Treaty of the Functioning of the EU). In the taxpayer's view, dividends distributed by resident subsidiaries to non-resident parent companies are subject to a discriminatory treatment in so far as resident parent companies are not subject to a beneficial ownership requirement to benefit from the domestic parent subsidiary regime and the tax rate applied is higher than that would be applicable in case of French parent company.

- The taxpayer's alternative plea was that if withholding tax exemption is not provided, a lower rate of 5% should be provided as per Article 8 of the treaty between France and Luxembourg.

4. Decision of the Supreme Court of France

The Court rejected all the taxpayer's contentions based on the following:

- For the first contention, the Court accepted lower courts' finding that, based on the facts of the case, the Luxembourg parent company could not be considered as the beneficial owner of the interim dividend, within the meaning of French domestic rules for the withholding tax exemption for EU parent companies (article 119 ter of the General Tax Code). It also held that the lower court did not disregard the rules governing the allocation of the burden of proof and gave sufficient reasons for its judgement.

- For the second argument,
  - o the Court relied on the judgement of the Court of

Justice of the European Union (CJEU) of 26 February 2019, *Skatteministeriet v T Denmark and Y Denmark Aps (Case C-116/16 and C 117/16)* that the status of beneficial owner of dividends must be regarded as a condition for benefiting from the exemption, from withholding tax provided for in Article 5 of Directive 90/435/EEC of 23 July 1990, reproduced in Article 5 of Directive 2011/96/EU (Directive) of 30 November 2011.

- the Court ruled that the French domestic rules under Article 2 of Article 119 aligns with the objectives of the Parent-Subsidiary Directive (2011/96/EU). Also, the parent company regime resulting from the provisions of Articles 145 and 216 of the General Tax Code, must be regarded as ensuring the transposition of the objectives of that directive. Since, in respect of both the Corporate Income Tax (CIT) exemption applicable to resident parent companies (transposing objective of article 4 of the Directive) and the withholding tax exemption applicable to non-resident companies (article 5 of the Directive), it could not be argued that there was difference of treatment between resident and non-resident parent companies receiving dividend from the French subsidiary.

- a distributing subsidiary established in France is liable for the withholding tax, was inherent in the method of taxation and has no bearing on the taxpayer status of the non-resident recipient company from which the subsidiary may request repayment of the tax paid on its behalf. FVR was not entitled to argue that the challenge to the exemption from the withholding tax would be borne solely by the French distributing subsidiary, whereas a French parent company would bear alone the challenge to the regime resulting from Articles 145 and 216 of the General Tax Code from which it would have unduly benefited. For the rate, the Court held that the 30% withholding tax rate applied to the grossed-up base was lower than the CIT rate applicable in 2014.

For the alternative plea of FVR to provide benefit of reduced rate of withholding under the treaty, the Court held as under:

- The absence of an express clause in a treaty making the application of a reduced rate of withholding tax subject to the status of beneficial owner of a dividend from a French source, did not prevent the tax authorities from denying that treaty benefit to the recipient of that income who is only the apparent beneficiary,

- on the contrary, a taxpayer, that is the beneficial owner of an income, may benefit from the above-mentioned treaty provisions, even if such income was paid to an intermediary person located in a third state.

- Even if the Luxembourg holding company and the individual domiciled in Germany were considered to be the beneficial owners of the interim dividend based on documents filed with lower courts, the same could not be said of their status as tax residents of Luxembourg and Germany respectively, nor in the case of holding company compliance with the condition set out in Article 10 bis of the Franco-Luxembourg tax treaty. Consequently, and in any event, the applicant company was not entitled to argue that the 15% withholding tax rate provided for in Article 8(2)(a)(2) of the France-Luxembourg tax treaty and Article 9 of the Franco-German tax treaty should be applied.

5. Indian context of the decision

5.1. Witholding tax provisions under the domestic law of India

Under the domestic law, dividend[6] is defined inclusively, i.e., apart from dividend proper, certain distributions/ outflows have also been included to be considered as deemed dividend. Except for one deeming provision in the context of loan to shareholder or entity in which such shareholder has substantial interest, where beneficial ownership criteria needs to be fulfilled, distribution to a registered shareholder is sufficient to be considered as dividend and shareholder need not prove to be a beneficial owner.

Withholding liability on dividend income is different for residents and non-residents. Withholding on payments to residents is at 10% whereas for non-residents, it is 20% subject to treaty rates (for distribution by IFSC unit, withholding tax rate is 10%).

Differences in withholding tax rates cannot be considered as discrimination based on explanation 1 to section 90 which provides that the charge of tax in respect of a foreign company at a rate higher than the rate at which a domestic company is chargeable, shall not be regarded as less favourable charge or levy of tax in respect of such foreign company.

5.2. Beneficial ownership under tax treaties

In almost all tax treaties that India has signed with other countries, taxpayers must prove beneficial ownership to avail lower rate of withholding on dividend, interest, royalty and fees for technical services. Beneficial ownership is an independent requirement to avail lower rate of taxation under the treaty. Treaty benefit may be denied by the tax authorities on non-fulfillment of beneficial ownership requirement without invoking general anti avoidance rules under the Income Tax Act or the Principal Purpose Test under the treaty.

6. Section 2(22) of the Income Tax Act, 1961

In the context of capital gains, generally, beneficial ownership is not an explicit requirement in a Treaty to avail the relevant Treaty benefit. However, tax authorities have been alleging, especially for investments from Mauritian holding companies, that such holding companies are not the beneficial owners of shares of Indian companies and therefore, capital gain exemption should not be allowed. Indian courts[7] have been taking a favourable view based on tax residency certificate issued by the tax authorities of Mauritius, based on Circular 789 dated 13 April 2000, with regard to beneficial ownership and considering that the holding company has separate legal existence.

In KSPG Netherlands Holdings BV[8], the Authority for Advance Ruling (AAR) observed that even if the concept of 'beneficial ownership' which finds specific mention in Articles 10 to 12 of the India-Netherlands tax treaty can be transposed into Article 13 relating to capital gains, as far as the intermediary has a distinct corporate personality it cannot be considered as a sham entity set up merely for the purpose of avoidance of tax.

Also, Tribunals[9] have considered tax residency certificate issued by the tax authorities of other countries, to be conclusive evidence of beneficial ownership.

In *Blackstone Capital Partners (Singapore) Vi Fdi Three Pte. Ltd. v. ACIT (IT)*[10], the Delhi High Court held that under the India-Singapore DTAA, at the relevant time, capital gain was to be taxed on the basis of legal ownership and not on the basis of beneficial ownership. In fact, the concept of beneficial ownership, at the relevant time under the India Singapore DTAA, was attracted for taxation purposes only qua three transactions i.e. dividend, interest and royalty, and not for capital gains.

However, in Tiger Global International III Holdings case[6], the petitioner had argued before the Delhi High Court that in the absence of explicit requirement of beneficial ownership for capital gain exemption, such condition should not be considered for denying the benefit of capital gain exemption. The Delhi High Court did not give any finding on this point and seems to have implicitly applied beneficial ownership requirement. The case had been heard by the Supreme Court and the decision is reserved. It would be interesting to see whether the Supreme Court has any observation on this point.

5.3. Treaty benefit to beneficial owner in third state

In a case where the recipient of income resident in a state, say State R is not considered as beneficial owner and beneficial

7. *Tiger Global International III Holdings [TS-624-HC-2024 (Del)]; Bid Services Division Mauritius Limited [2023] 148 taxmann.com 215 (Bom); Sanofi Pasteur Holding SA vs. Department of Revenue [2013] 30 taxman.com 222 (AP)*
8. [2010] 324 ITR 1 (AAR)
9. *HSBC Bank (Mauritius) Ltd. v. DCIT [2018] 96 taxmann.com 544 (Mumbai - Trib.); Imerys Asia Pacific (P.) Ltd. v. DDIT [2016] 69 taxmann.com 454 (Pune); DIT v. Universal International Music B.V. [2013] 31 taxmann.com 223 (Bom.)*
10. [2023] 146 taxmann.com 569 (Delhi HC)

owner is resident of State R or a third state (Say, State T), whether treaty benefit can be claimed by the beneficial owner of income and whether treaty of source state (State S) and third state (State T) can be applied is a debatable issue.

Para 7 of the OECD Commentary, 2017 on Article 10 observes that the term "paid" has a very wide meaning. The concept of payment means the fulfilment of the obligation to put funds at the disposal of the creditor in the manner required by the contract or custom. Further, para 12 and 12.1 of the Commentary states that the concept of "beneficial owner" was inserted to clarify the meaning of the words "paid to a resident" in paragraph 1 of Article 10 and this concept should be interpreted in that context i.e., paid to the beneficial owner. If the recipient of dividend is not the beneficial owner, being an agent of the beneficial owner, then the benefit of treaty between the state of payer of dividend and state of beneficial owner may be availed.

In *Aditya Birla Nuvo v. DDIT*[11], the Bombay High Court was dealing with a case where the intermediary company in Mauritius was only a 'permitted transferee' of shares of Indian company and not the beneficial owner. The beneficial owner was a company in US. The High Court observed that if the beneficial ownership of the shares had vested in the Mauritius company, then India-Mauritius tax treaty would be applicable and if the beneficial ownership in those shares had vested in a US company, then the capital gains arising on transfer of the Indian company shares would be taxable in the hands of US company to which treaty between India and USA would apply.

Similar view has been taken by the Eastern High Court of Denmark in the case of *Ministry of Taxation v. NetApp Denmark Aps*[12] in the context of dividend.

Though in the above cases, there was an observation that the treaty of the resident state of beneficial owner (State T) can be applied, one will need to see how the same is interpreted by the Indian courts. As per the language of the tax treaties, dividends paid by a company which is a resident of State S, to a resident of State R, may be taxed in State S at a lower rate if the beneficial owner of the dividends is a resident of State R. Based on literal language of the treaty, one school of thought is that both the recipient and beneficial owner should be in State R to avail benefit of lower rate of tax on dividend. Another school of thought is that if the beneficial owner of the income is in third state, the benefit of treaty of State S and State T shall be available if benefit of treaty of State S and State R is denied. In this scenario, the beneficial owner may be required to fulfil all the conditions of being a resident of State T, to avail the benefit of the treaty between State S and State T.

In *JC Bamford Investments Rocester v. DCIT*[13], in a case where the recipient of

11. [2011] 200 Taxman 437 (Bom.)
12. TS 398 FC 2021c(Den)
13. [2014] 47 taxmann.com 283 (Delhi Trib.)

royalty income in UK (sub-licensee of technology) was not considered as the beneficial owner but the original licensee, also a tax resident of UK, was considered as beneficial owner, the Delhi Tribunal allowed the benefit of India-UK tax treaty to the recipient of income. The Delhi Tribunal held that the requirement for the applicability of Article 13(2) of the DTAA is that the beneficial owner should be a resident of UK. It is not that if the formal recipient, a resident of UK, is not the beneficial owner, then the benefit is lost, notwithstanding the fact that the beneficial owner is also the resident of UK. Such relief of lower rate of taxation can be denied if the beneficial owner of the royalty is a resident of some third state, neither being India nor UK. However, there was no observation unlike in the French case that the beneficial owner also has to prove residential status to claim the benefit of the treaty which was required as per Article 10 bis of the France-Luxembourg tax treaty.

6. Conclusion

India had dividend distribution tax wherein the company distributing the dividend had to pay tax on dividend and the shareholders were not taxable on dividend income till 31 March 2020. Therefore, the question of applicability of beneficial ownership to claim lower rate of taxation on dividend income did not generally arise. However, with abolishment of dividend distribution tax, it has become imperative to substantiate that the shareholder receiving dividend income is also the beneficial owner of dividend to avail the benefit of lower rate of tax under the treaty; similarly so for royalty, fees for technical services and interest. Also, for taking benefit of treaty for capital gains, fulfillment of beneficial ownership criteria has become important considering the judicial precedents discussed earlier. As there are still uncertainties with regard to interpretation of the words 'beneficial owner' and applicability of the treaty of the state of beneficial owner if the legal owner is resident of another state, it would be interesting to keep a watch on the judicial precedents, both domestic and international to understand the concept of 'beneficial ownership' and application to avail the benefit of the treaties. Also, the interplay between the general anti-abuse provision under the domestic law and treaty and beneficial ownership requirement under the specific provision of the tax treaties, needs to be carefully considered.

Disclaimer: The comments expressed by the authors are personal and should not be considered as comments / views of any organisation.

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Oracle Corporation Australia Pty Ltd v Commissioner of Taxation (Stay Application) [2024] FCA 1262


*CA Gaurav Mittal **   *CA Gaurav Goyal **

I. INTRODUCTION

Oracle Corporation Australia Pty Ltd ('Oracle Australia') paid certain sub-licence fees to Oracle Capac Services Unlimited Company ('Oracle Ireland') for inter alia use of computer program in which Oracle Ireland owned the copyright. The Commissioner of Taxation ('the

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Gaurav Goyal is a seasoned professional with 19+ years of experience in direct tax and transfer pricing; leveraging expertise and in-depth knowledge in international taxation, M&A, contract structuring, and entity-options. He is an expert in providing comprehensive tax analysis, optimizing tax strategies, and securing favourable outcomes for clients, resulting in significant tax savings and business growth. He has been managing tax compliance, tax audit and litigation, writ petition, and advance ruling proceedings for clients, achieving favourable outcomes. Gaurav has demonstrated success in managing clients from diverse sectors such as oil and gas, EPC, agriculture, aerospace and defence, publishing, real estate, retail, and overseas government bodies. He is adept at building & maintaining strong relationships with clients, Government bodies, Legal Counsel, & cross-functional teams, fostering collaboration & driving successful outcomes.

Commissioner') characterised this payment as 'royalties' under Article 13(3) of the Australia-Ireland DTAA and levied penalty on Oracle Australia for non-withholding and raised a tax demand on Oracle Ireland. While these proceedings were ongoing, Oracle Ireland filed Mutual Agreement Procedure ('MAP') application with the Ireland Revenue Commissioner ('IRC') which were accepted, and MAP proceedings were initiated. However, due to ongoing tax litigation under the domestic law, the Australian Taxation Office ('ATO') suspended the ongoing MAP proceedings.

Through this petition, Oracle Australia and Oracle Ireland (collectively referred to as 'the applicants') sought a temporary stay of ongoing domestic tax proceedings to enable the continuation of ongoing MAP proceedings between Australia and Ireland.

II. DETAILED BACKGROUND AND PROCEDURAL HISTORY

Oracle Australia operated as a distributor of Oracle-branded software and hardware products in the Australian market. Its operations were conducted under sublicensing agreements with Oracle Ireland. This supply was governed by complex contractual arrangements whereby one bundle of right obtained by Oracle Australia was the use of Oracle Ireland's computer program.

The Commissioner characterised payments for the use of computer programs as 'royalties' under Article 13(3) of the Australia-Ireland DTAA. The Commissioner issued penalty notices to Oracle Australia for failure to withhold tax from the royalty payments and refused to remit those penalties and also sent a notice of non-resident royalty withholding tax to Oracle Ireland.

In response, Oracle Ireland filed MAP application with the IRC, and MAP proceedings were initiated with the ATO.

Further, under Australian domestic law, the applicants challenged the Commissioner's decisions in the Federal Court. At the time of challenge, the MAP has advanced sufficiently for competent authorities of both the jurisdictions to have provided their position papers to each other. Hence, applicants sought a stay of the domestic proceedings so that the MAP could be pursued to completion.

However, the ATO exercised its rights under Article 19(2) of the Multilateral Instrument (MLI), which allows the competent authority to suspend a MAP when the same issues are pending before a domestic court or tribunal. As a result, the MAP was put on hold.

In the light of above developments, the applicants filed the present stay application with the Federal Court seeking a stay on domestic law proceedings to allow the MAP to proceed uninterrupted.

The applicants' position was that the MAP should be allowed to continue to fulfil its intended purpose, and that the commencement of domestic proceedings—mandated by statutory limitations—should not preclude the use of alternative treaty-based remedies.

Section 23 of Federal Court of Australia Act, 1976 grants the Court wide powers to make orders it deems appropriate, including temporary stays. However, the provisions of the domestic tax law and the MLI give no explicit guidance on the circumstances in which the suspension of the domestic proceeding referred to in Article 19(2) of the MLI should occur.

III. LEGAL FRAMEWORK

The Australia-Ireland DTAA is a Covered Tax Agreement under the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI). Both Ireland and Australia have acceded to the MLI.

Both the MLI and the DTAA have the force of Commonwealth law in Australia under the International Tax Agreements Act, 1953.

Under Article 26 of the DTAA, the competent authorities of Australia and of Ireland can resolve taxpayer disputes through MAP. The MLI modifies this procedure (Article 16) and supplements it with mandatory binding arbitration (Article 19).

Article 19(1) provides that where the competent authorities are unable to reach an agreement resolving a case presented by a taxpayer within two years, any unresolved issues arising from the case shall be submitted to arbitration if the taxpayer so requests in writing.

Article 19(2) of the MLI provides that where a competent authority has suspended the MAP 'because a case with respect to one or more of the same issues is pending before a court or administrative tribunal', the time running on the pre-arbitration period as contained in Article 19(1) will stop until the final decision is rendered by the court or the case before the court has been suspended or withdrawn.

IV. KEY ISSUES

1. Whether domestic proceedings should be temporarily stayed to allow MAP (and potential arbitration) to continue.

2. Whether denial of a stay of domestic proceedings would amount to forcing the applicants to choose between treaty and domestic remedies due to procedural deadlines.

3. Whether public interest and broader international tax concerns outweighed the applicant's right to pursue MAP.

V. COURT'S ANALYSIS

The Court's analysis focused on the legal and practical consequences of granting or refusing the stay, the interpretive approach to the MLI and DTAA, and the public interest implications involved in resolving the core dispute.

The Court noted that it was accepted by both parties that if the Court granted the stay, the ATO would be compelled to resume the MAP, and potentially, the matter could be resolved through arbitration.

However, if the stay was denied and the domestic litigation is proceeded, a final court ruling on the characterisation of the payments as royalties would be binding upon the Commissioner, and as an officer of the Commonwealth, the Commissioner would be precluded from reaching any MAP agreement that contradicted the court's decision.

However, the avoidance of double taxation can still be achieved by other means (for instance, foreign tax credit).

The Court also highlighted that Ireland and Australia had entered a reservation under Article 19(12) of the MLI, which provides that arbitration cannot proceed if a court or tribunal has rendered a decision on the issue in question. This reservation was particularly significant in the case at hand, because if the stay were refused and litigation went forward, the resolution of the core issue—whether the payments constituted royalties—would become fixed by judicial authority. As a result, if the ATO and the IRC were unable to reach an agreement, the matter will not proceed to the arbitration. Thus, if the domestic proceedings were not stayed, and were instead adjudicated to finality, the MAP would become moot, and arbitration under Article 19(1) would be barred, and the taxpayers would be left without the treaty-based mechanism they had invoked.

This situation posed a substantial risk of double taxation, as it was conceivable that the IRC and the Australian courts might arrive at different interpretations of the DTAA. Although the MAP was designed to avoid such outcomes, its utility would be nullified if one country imposed a binding domestic decision that conflicted with the other's interpretation. Granting the stay, on the other hand, would preserve the possibility of a coordinated, bilateral resolution through MAP and arbitration, which could potentially harmonise the two jurisdictions' views.

However, the Court acknowledged that even if the MAP resumed, there was no guarantee that it would result in an agreement. The MAP process could still fail to deliver an outcome acceptable to the taxpayers, who retained the right to reject any resolution reached through MAP[1]. If that occurred, the matter would revert to domestic litigation, potentially prolonging the dispute and undermining procedural efficiency.

If a stay is refused, it would, in effect, allow the Commissioner to force taxpayers to choose between pursuing the MAP and maintaining their domestic appeal rights, whereas both the DTAA and the MLI contemplate that a taxpayer should have access to the MAP in addition to domestic legal remedies. The OECD Commentary does not suggest that the choice belongs to the competent authority.

The DTAA, even before its modification by the MLI, included provisions explicitly stating that MAP could be accessed notwithstanding the remedies provided by the domestic law of the contracting states. The MLI reaffirmed this through Article 16(1), which states that a taxpayer may present their case to the competent authority irrespective of the remedies provided by the domestic law. Furthermore, Article 16(2) of the MLI emphasises that any agreement reached through the MAP shall be implemented notwithstanding any time limits in the domestic law of the contracting states. These provisions collectively affirm the principle that the taxpayer should be permitted to

1. The Court recognised that any agreement reached between competent authorities through the MAP is not binding on the taxpayer. Although it is the taxpayer who initiates the MAP, the outcome binds only the tax authorities, not the initiating party.

access the MAP in addition to any domestic procedure.

The Court cited both the Action 14 Report and the OECD Commentary[2] to support the proposition that the decision to pursue the MAP or litigation primarily lies with the taxpayer. This choice is subject to procedural rules like the Court's authority over the stay applications. Thus, the domestic court must decide which process should proceed, despite the DTAA and MLI indicating that the taxpayer should retain that option.

The OECD Commentary acknowledges the approach adopted by most countries whereby while a taxpayer can access both the MAP and domestic legal avenues, they cannot actively pursue both concurrently. Where the legal remedies are still available under domestic law, competent authorities usually require that the taxpayer agree to pause those remedies, or otherwise delay the MAP until domestic proceedings are exhausted.

The MAP had been suspended solely because of the initiation of domestic proceedings. These proceedings, however, were brought only because of a mandatory statutory time limit triggered by the Commissioner's objection decisions. The taxpayers did not want to litigate the matter but were compelled to do so. Their immediate application for a stay underscored this preference.

The Court observed that while neither the DTAA nor the MLI explicitly prioritises the MAP over domestic proceedings, they also do not envisage a scenario where a taxpayer is compelled to choose between these two options due to time constraints imposed by the Commissioner's objection decision under domestic law.

The Commissioner submitted that the Federal Court had the requisite subject matter expertise to provide authoritative guidance, unlike an arbitral panel formed under the MLI, which might lack experience in nuanced domestic legal matters. Although Article 20(2) of the MLI requires panel members to have expertise in international tax law, it does not mandate familiarity with Australian copyright principles. While it was open to the parties to appoint at least one panelist with dual expertise, the Commissioner argued that this did not guarantee the same level of institutional competence that a court could provide. The Court acknowledged the relevance of this point but did not agree with the Commissioner that Court is more suited than the panel for dealing with the issues of this kind.

Another important consideration was the value of judicial precedent. The Commissioner argued that a ruling by the Federal Court would establish binding principles that could guide not only the ATO but also other taxpayers involved in similar disputes. At least fifteen other taxpayers were reportedly subject to assessments involving similar characterisations of software-related payments. The decision of an arbitral panel, by contrast, would yield a private, non-precedential outcome that would not aid

2. Para 44 of the OECD Commentary (2017) on Article 25

in resolving the systemic legal uncertainty surrounding this issue. The Court viewed this argument as carrying significant weight.

The Commissioner further submitted that Australia's interpretation[3] of royalty provisions in the DTAA had already attracted criticism from foreign tax authorities, particularly the United States. The U.S. Treasury had reportedly raised concerns that the ATO's approach to classifying certain software payments as royalties conflicted with U.S. domestic law and deviated from OECD guidance. Resolving the issue through a definitive judicial ruling could help clarify Australia's legal position and potentially defuse diplomatic tensions in ongoing bilateral treaty negotiations. Arbitration, lacking transparency and explanation, would not provide the same utility in international discussions. The Court agreed that these international dimensions bolstered the public interest in judicial resolution.

The risk of inconsistent outcomes also weighed against granting the stay. Since other MAP or arbitration proceedings involving similarly situated taxpayers might proceed in parallel, the possibility of divergent outcomes was real. Multiple arbitral awards could yield inconsistent conclusions on the same legal question, undermining the coherence of tax administration. A single ruling from the Federal Court would provide uniform guidance and reinforce consistency in the interpretation of Australia's tax treaties.

Procedural efficiency was also raised as a factor. The Commissioner argued that the arbitration process could extend the resolution timeline significantly. If the arbitration failed or if the taxpayers rejected its outcome, domestic litigation would resume, delaying finality further. In contrast, proceeding with litigation now would avoid the duplication of effort. The Court considered this risk but noted that the current hearing schedules already anticipated a 2026 or later hearing date. An appeal to the Full Court and to the High Court is also a possibility, making delay a less decisive factor.

The taxpayers pointed to OECD Commentary paragraph 41(b), which suggests MAP cases should be resolved on their own merits, without balancing outcomes across taxpayers. While the Court acknowledged this, it found that the widespread impact of the dispute diminished the effectiveness of this point. With at least 15 similar cases and the possibility of inconsistent arbitration, the Court felt judicial resolution was more appropriate.

Other taxpayer's arguments/ points

The taxpayers emphasised that the IRC had agreed to Oracle Ireland's MAP request. This demonstrated the legitimacy of Oracle's position. The Court noted that both sides had substantive claims, making this a neutral factor rather than one favouring the stay.

The taxpayers argued that they were statistically likely to accept the MAP outcome to avoid double taxation. The Court accepted this as a reasonable point, although it treated reliance on such probabilities with caution.

3. Draft TR 2021/D4 and its revised version Draft TR 2024/D1

The taxpayers stressed that both Australia and Ireland had committed to arbitration under the MLI and argued that denying the stay would weaken this commitment and the credibility of the MAP. The Court acknowledged the submission but concluded that it did not materially advance the case for a stay, since the MLI itself allows the competent authority to suspend the MAP once domestic proceedings are initiated.

The taxpayers asserted that the ATO acted in bad faith by suspending the MAP after the IRC had accepted the request. They argued that the ATO had usurped the IRC's role and exercised its power improperly. The Court rejected these claims, holding that Article 19(2) grants each competent authority an independent right to suspend the MAP when litigation is underway. To find otherwise would render Article 19(2) ineffective whenever a foreign authority accepted a MAP request.

VI. DECISION

From the perspective of treaty interpretation and administrative fairness, the Court recognised the strong rationale in favour of granting the stay. It ensured that taxpayers would not be deprived of treaty-based dispute resolution solely due to their compliance with mandatory domestic deadlines. Nevertheless, the analysis also required the Court to consider broader public interest and discretionary factors.

After assessing both the legal foundations and discretionary elements, the Court concluded that the balance of considerations favoured refusing the stay application. While the taxpayers were entitled to access the MAP and arbitration mechanisms in principle, the broader systemic issues—particularly the need for binding precedent, the presence of multiple related cases, and the potential for conflicting arbitration outcomes—compelled the Court to prioritize domestic adjudication.

Accordingly, the stay application was dismissed. However, given the complex legal and international dimensions of the case, the Court granted leave to appeal, recognising the importance of appellate review in settling these important issues.

VII. OUR COMMENTS

In the Indian context, the Central Board of Direct Taxes ('CBDT') has issued MAP guidance[4] pursuant to the recommendation of the BEPS Action 14 final report on "Making Dispute Resolution More Effective" to publish comprehensive MAP guidance.

In the guidance, the CBDT has explained MAP inter-play with various domestic dispute resolution remedies such as Advance Pricing Agreements, safe harbours, appeal before Income-tax Appellate Tribunal ('ITAT'), settlement commission, Authority for Advance Rulings and Direct Tax Vivad se Vishwas Act.

Specifically, in the context of an appeal before ITAT the guidance notes that *"Since MAP and domestic remedy proceedings can be availed by the taxpayers simultaneously, there could*

4. vide Circular F. No. 500/09/2016-APA-I, dated 7-8-2020

be instances where the Income-tax Appellate Tribunal ('ITAT', hereinafter) in India passes an order in respect of the same disputes that are also being examined under MAP."

Further, in 2022 the CBDT issued an update to the MAP guidelines[5] where it noted that many of India's treaty partners do not allow appeal and MAP proceedings to be pursued simultaneously, while on the other hand, India follows a liberal regime where the taxpayer can choose to pursue both appeal and MAP proceedings simultaneously.

Having said that, India has taken a view that where the taxpayer receives an order from the ITAT with respect to the disputed issues in the MAP application, while taxpayer shall have access to MAP; but Indian Competent Authorities will not be able to deviate from the ITAT order and thus will only seek correlative relief at the level of the treaty partner.

Hence, to avoid closure of MAP on account of an ITAT order, it would be imperative for a taxpayer to seek stay of ITAT proceedings while the MAP negotiations are ongoing. This is even more important given that the ITAT is not the final appellate body; an order of ITAT can be appealed by both the taxpayer and tax authorities to a jurisdictional High Court and then to the Supreme Court of India.

Rule 32 of the Income-tax (Appellate Tribunal) Rules, 1963 provides that the ITAT may, on such terms as it thinks fit, and at any stage, adjourn the hearing of the appeal. Thus, there is no specific guidance on adjournment of ITAT proceedings where MAP proceedings are ongoing. An Indian court[6] has taken a view that where sufficient cause is shown, then the case should be adjourned in the interest of justice.

In light of above position on interplay of MAP with domestic appellate process, the decision of Australian Federal court may provide guidance to situations where taxpayers need to seek adjournment of ITAT proceedings due to ongoing MAP proceedings. It would be interesting to note while the Australian Federal Court in the instant case refused to stay the domestic appellate proceedings, the judge has observed that *"Were it not for the position of the 15 other taxpayers and the dispute with the United States, I would grant the stay sought."* Thus, in a case where larger public interest is not in consideration, this ruling can be used by taxpayers in their favour.

5. vide Circular F. No. 500/09/2016-APA-I, dated 10-06-2022
6. In the case of *Mehru Electrical & Engg. (P.) Ltd. v. CIT [2012] 22 taxmann.com 45 (Raj.)*

Belgium – European Court of Justice, Case No C-623/22

*CA N. C. Hegde **

On 29 July 2024, the Court of Justice of the European Union (Second Chamber) (hereinafter referred to as the 'CJEU') ruled on the validity of Articles 8ab(1), (5), (6) and (7) of *Council Directive 2011/16/EU of 15 February 2011* as amended by Directive 2018/822 **(popularly referred to as 'DAC6')** based on a request made by the Belgian Constitutional Court.

This directive (DAC6) was issued in the context of *administrative cooperation in the field of taxation*. The directive introduced an obligation for intermediaries and, in certain instances, taxpayers to report on potentially aggressive cross-border tax planning arrangements to the competent authorities.

The CJEU upheld the EU's directive on reporting obligations for intermediaries to inform tax authorities of certain cross-border arrangements that could potentially be used for aggressive tax planning.

FACTS

The Belgian Association of Tax Lawyers and other professional bodies filed proceedings in the Belgium Constitutional Court. The domestic proceedings brought before the Belgium Constitutional Court challenged the validity of the Belgian law adopting DAC6 provisions in

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the context of the Charter of Fundamental Rights of the European Union. The petition sought annulment of the Belgian law implementing the DAC6 directive due to lack of legal certainty as well as other concerns relating to privacy.

If one was to related this to an Indian context, it would be equivalent to challenging a legislation enacted or a directive issued in the form of a Board circular issued by the CBDT on grounds of constitutionality on grounds that it violates articles 14 and 21 of the Constitution on the grounds of equality, right to privacy etc.

DECISION

The five questions posed by the Belgium court and the ruling by the CJEU is summarized as under:

1. **Does the directive infringe the principles of equal treatment and non-discrimination in extending the reporting obligation beyond direct tax?**

The CJEU held that, although the directive was mainly aimed at direct tax,any other type of tax may also be subjected to aggressive tax planning. The different tax types subject to the reporting obligations would fall within comparable situations in the light of the objective and the legislation was not invalid because of that reason.

2&3. **Was the directive was valid considering the principle of legal certainty, the principle of legality in criminal matters as per the charter of the European Union?**

The CJEU addressed the second and third questions together. The principle of legal certainty as per the EU chartere requires "clear and precise legal rules. As regards the principle of legality in criminal matters, while the directive did not by itself specify penalties for non-compliance with the Reporting Obligation, Article 25a of the directive required Member States to establish effective, proportionate, and dissuasive penalties. An absence of clarity or precision in the concepts and time limits governing the required conduct would be required failing which there may be a violation of the principle of legality in criminal matters. The CJEU looked at the various concepts and terms used in the directive and concluded that these were broad concepts which could not be said not to be laying down 'clear and precise rules'. While there was some amount of ambiguity or vagueness, these could be removed by using the ordinary methods of interpretation of the law,case law of European courts and the utilisation of relevant international agreements and practices which utilise those concepts. Hence the CJEU decided that the Reporting Obligation under the directive was sufficiently precise and could not be considered invalid on grounds of legal certainty and principle of legality in criminal matters.

4. **Does the requirement of the directive to notify aggressive cross border tax planning extend to intermediaries who are not lawyers but are subject to professional secrecy under national law?**

The CJEU decided that in exercising their discretion to identify which professions are covered by legal professional privilege, Member States should not extend the benefit to professions which are not authorised to ensure such legal representation. Thus other professionals (lawyer intermediaries) who, although authorised by the Member States to allow to represent in legal matters do not meet characteristics akin to a lawyer's role as collaborating in the administration of justice. They would consequently be required to notify any aggressive cross border tax planning as per the directive.

5. In mandating the Reporting Obligation, does DAC6 infringe the right of respect for private life in Article 7 of the Charter?

From an overall perspective, the CJEU noted that the Reporting Obligation did limit the freedom of taxpayers and intermediaries to organise their personal, professional and business activities, and therefore constituted an interference with the right to respect for private life guaranteed in Article 7 of the Charter. However such interference was justified and proportionate in view of the objectives of the directive in the general public interest of the EU in combating aggressive tax planning and preventing the risks of tax avoidance and evasion. It concluded that the reporting obligation at issue does not infringe the right to respect for private life.

Comments

Looking at the angle of the reporting of aggressive tax planning obligations and the Indian context, India has very detailed General Anti Avoidance Rules (GAAR) in sections 95 to section 102 of the Income Tax act. However while there is a requirement in the in clause 30 C of Form 3 CD of the Tax audit report to report impermissible avoidance agreements and tax benefit to the taxpayer, there is still no directive on part of professionals and other intermediaries who have helped structure the transaction to report these to tax authorities. It is normally for the tax auditor to take a stand on whether the taxpayer has entered into an impermissible tax avoidance arrangement or not.

Further in India while we have detailed General Anti Avoidance Rules (GAAR), we have not yet heard of the law being challenged on the constitutional validity of the same. It would be interesting to note that the above case would provide a basis for a petition of certain principles like principles around equality and discrimination could probably be challenged in terms of Article 14.

One has noted that in India Courts have normally permitted the legislature to have a greater latitude in economic matters and tax laws and hence challenges to tax laws have not been very successful. What is also interesting to note is that the Charter of Rights by the EU has some important principles like legal certainty, principle of legality in criminal matters which need to be also incorporated in the rights of the Indian taxpayer.

To conclude, while the ruling in DAC6 may not have any direct implications on similar tax matters as far as the Indian tax law is concerned, it does provide for interesting insights for taxpayers to look at constitutional challenges in case the law does impact rights of taxpayers adversely.

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