Tax treaty benefits cannot be denied merely because Tax Residency Certificate required under section 90(4) not furnished

July 3, 2018

In brief

In a recent ruling,[1] the Ahmedabad bench of the Income-tax Appellate Tribunal (Tribunal), *inter-alia*, held that Double Taxation Avoidance Agreement (tax treaty) provisions cannot be denied merely on the basis of non-furnishing of the tax residency certificate (TRC). The Tribunal also emphasised that in the absence of a TRC, in order to claim tax treaty benefits, the foreign enterprise has to substantiate its residential status as per Article 4(1) of the India and USA tax treaty.

In detail

Facts

- The taxpayer made certain payments to a company resident of USA (US Co.) for installation and commissioning of an equipment in India.
- No taxes were withheld on such payments by the taxpayer on the premise that the payments were not chargeable to tax in India as per the beneficial provision of the tax treaty.
- The tax officer (TO) held that the services rendered by the US Co. were taxable as per the provisions of section 9(1)(vii) of the Income-tax Act, 1961 (the Act) and Article 12 of the India-USA tax treaty.
- Since no taxes were withheld by the taxpayer, the payments made by the taxpayer was disallowed by the TO in the assessment order of the taxpayer.
- Aggrieved by the TO's order, the taxpayer appealed before the Commissioner of Income-tax (Appeals) [CIT(A)]. The CIT(A) upheld the disallowance made by the TO as it observed that the US Co. had not furnished a valid TRC. Further, the CIT(A) held that the US Co. was not entitled to the beneficial provisions of the tax treaty.

Issue before the Tribunal

Whether the requirement of obtaining TRC was mandatory to grant the benefits of the India-USA tax treaty to the non-resident taxpayers?

Tribunal's ruling

- The Tribunal observed that as per the provisions of section 90(2) of the Act, the provisions of the Act shall apply *only* to the extent they are more beneficial to that the taxpayer and the same was often referred to as "treaty override".
- The Tribunal also observed that the provisions of section 90(4) do not start with a *non-obstante* clause *vis-à-vis* section 90(2) of the Act. In the absence of such *non-obstante* clause, the Tribunal has held that section 90(4) cannot be construed as limitation to the tax treaty superiority as stipulated in section 90(2) of the Act. Thereby the Tribunal has held that in the absence of a valid TRC,

[1] ITA Nos. 478 and 479/Ahmedabad/2018

provisions of section 90(4) could not be invoked to deny tax treaty benefits.

- Though the requirement to furnish TRC was not mandatory, the Tribunal has, nevertheless, emphasised that the US Co. had to establish that it was a USA tax resident. The onus was on the taxpayer to give sufficient and reasonable evidence to satisfy the requirements of Article 4(1) of the tax treaty, particularly when the same was called into question.

The takeaways

- This ruling affirms the position that the tax treaty benefits cannot be denied merely on the basis of non-availability of TRC.

- Further it also affirms that, when a non-resident taxpayer has substantiated its residential status by way of sufficient and reasonable documentary evidence, the requirement of furnishing TRC would be persuasive and not mandatory.

Let's talk

For a deeper discussion of how this issue might affect your business, please contact your local PwC advisor

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