DEEP DIVE SESSION EPISODE 2:

INCOME TAX CASE STUDY INSIGHTS

[2024] 160 taxmann.com 12 (SC)

SUPREME COURT OF INDIA

Bharti Cellular Ltd.

v.

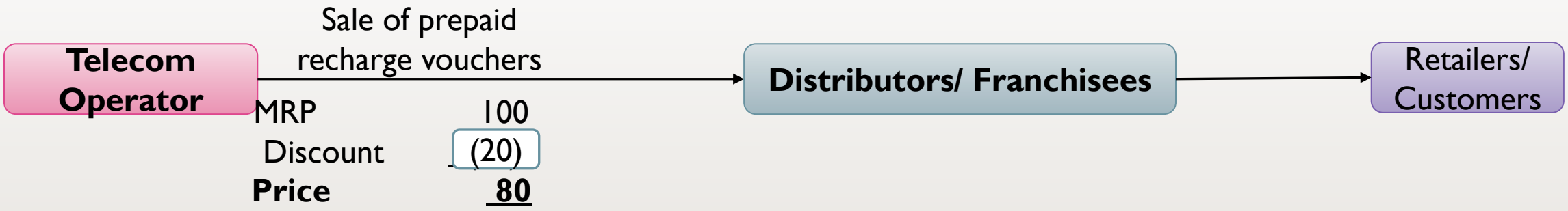
Assistant Commissioner of Income-tax

FEBRUARY 28, 2024

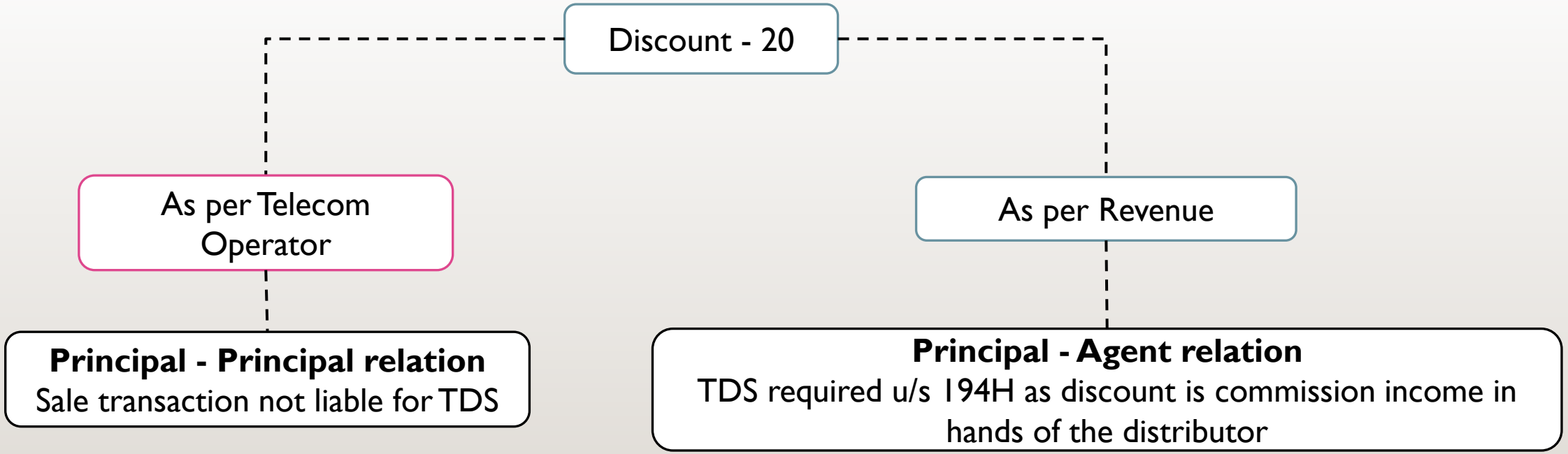
BACKGROUND OF THE CASE:

- Bharti Cellular is cellular mobile telephone service providers.
- It entered into agreements with distributors/franchisees for selling prepaid products (start-up kits and recharge vouchers).
- Assessee sold these products at a discounted price (less than printed price) to distributors/franchisees.
- Assessee claimed this discount was not commission or brokerage as defined under Section 194-H but a transaction of sale on Principal to Principal basis.
- Revenue contended that the relationship is that of Principal and Agent. Discount was actually commission/brokerage, thus liable for TDS u/s 194-H.

BACKGROUND OF THE CASE



TREATMENT OF DIFFERENCE BETWEEN MRP AND SP BY ASSESSEEE AND REVENUE



FRANCHISEE/DISTRIBUTOR AGREEMENT – KEY TERMS



- Franchisees/ distributors are appointed to market prepaid services and appoint retailers/outlets.
- Distributors cannot work with competing cellular service providers but Assessee can appoint other distributors/ franchisees.
- Franchisees/distributors must pay in advance for the welcome kit (SIM card, recharge vouchers, top-up cards, e-tops, etc.).
- The telecom operator provided the products at a reduced price.
- Payment for purchases is made before the products are sold or transferred to retailers/consumers.
- Franchisees/distributors are free to sell at any price up to the maximum MRP.

FRANCHISEE/DISTRIBUTOR AGREEMENT – KEY TERMS

Ownership of Products	All prepaid products (SIMs, vouchers, e-top-ups) remain the property of the assessee.
	Ownership does not transfer to the franchisee/distributor at any time.
Customer Documentation	Franchisees/distributors must collect signed agreements/contracts from customers.
	Completed forms must be submitted to the assessee for verification and records.

FRANCHISEE/DISTRIBUTOR AGREEMENT – KEY TERMS



Product Availability	Franchisees/distributors must maintain sufficient quantities of prepaid start-up packs and recharge coupons to meet market demand.
Sales Targets	Sales targets are reviewed and revised by the Assessee periodically.

FRANCHISEE/DISTRIBUTOR AGREEMENT – KEY TERMS



Additional requirements	Responsible for storage, safety, insurance, and losses.
	Maintain required infrastructure and follow Assessee's policies.
	Hire staff as per Assessee's standards.
	Comply with all legal and tax obligations.
	May need to modify infrastructure on Assessee's instructions at its own cost.

KEY LEGAL QUESTIONS



Does the discount given to distributors/ franchisees amount to commission?



Is there a principal-agent relationship?



Can TDS be enforced under Section 194-H in such transactions?

DECISIONS BY VARIOUS HIGH COURTS

High Courts had given conflicting decisions:

- **Delhi & Calcutta HCs:** TDS applicable under Section 194-H.
- **Rajasthan, Karnataka & Bombay HCs:** TDS not applicable under Section 194-H.

RELEVANT PROVISIONS OF LAW

*As per **Section 194H,** any person responsible for paying at the time of credit or at the time of payment, whichever is earlier, to a resident any income by way of commission or brokerage, shall deduct income tax at the prescribed rate.*

***Explanation (i) to section 194-H** defines the expressions 'commission' or 'brokerage', to include any payment received or receivable, directly or indirectly, by a person acting on behalf of another person for services rendered (not being professional services) or for any services in the course of buying or selling of goods or in relation to any transaction relating to any asset, valuable article or thing, not being securities.*

REVENUE'S ARGUMENT



- Prepaid SIM cards remained the property of Bharti Cellular. Franchisees/ distributors never owned the cards — so it was not a sale but a service model.
- Franchisees/distributors were acting on behalf of the telecom company, fulfilling statutory and operational obligations (like gathering customer forms). Hence, they were agents, not independent buyers/sellers.
- Revenue stressed the clause in Section 194H:
  - "*any payment received or receivable, directly or indirectly, by a person acting on behalf of another...*"
- Since franchisees earned income from reselling the telecom products on behalf of Bharti Cellular, that income (difference between discounted price and sale price) amounted to commission, triggering a TDS obligation u/s 194H.

DECISION OF SUPREME COURT [IN FAVOUR OF ASSESSEE]



- Although, the SIM cards remained the property of Bharti Cellular — but that's only due to licensing obligations imposed by Department of Telecommunications. In actual practice, the right to use the SIM card and its possession is handed over and given to the end-user, that is, the customer who installs the SIM card in his phone to avail the telecommunication services.
- Agency is a triangular relationship between Principal-Agent and Principal-Customer but such a relation does not exist.
- Distributors purchase at a discount, and the profits depend on their resale price. The telecom company has no control over the final sale price. The difference between the final sale price and discounted price is the margin or trading profit of the distributor.
- TDS under section 194H is applicable only when there's a payment of income by way of commission or brokerage directly or indirectly.

DECISION OF SUPREME COURT [IN FAVOUR OF ASSESSEE]



- Revenue has stated that there is indirect payment to Franchisee/ distributor which is in the nature of commission. But the payment being received by Franchisee/ distributor are not being received on behalf of Bharti airtel but on their account.
- Here, there is no direct or indirect payment or credit by the telecom operator to the distributor for services rendered. The income is generated by the distributor independently, and not credited or paid by the telecom company .
- The law requires TDS on the actual payment or credit of income, whichever is earlier. In this case, the franchisee/distributor earns income only when they sell the product to retailers or customers, based on the difference between their selling price and the discounted price. This income is not paid or credited by the cellular provider.

DECISION OF SUPREME COURT [IN FAVOUR OF ASSESSEE]



- Revenue has also stated that TDS should be deducted on the difference between the principal price and the discounted price. But revenue can not insist that the franchisee/ distributor must sell the products at the printed price.
- The contractual obligations of the distributors/franchisees, do not reflect a fiduciary character of the relationship, or the business being done on the principal's account.
- We are unable to visualize 'indirect' credit in the books of the payer to the account of the payee from this transaction. Credit entry is required even in cases of set-off.
- Revenue is not entitled to expand the scope of Section 194H.
- Therefore, no TDS under Section 194-H is applicable, as there's no commission or brokerage involved from the provider’s side.

[2025] 170 taxmann.com 305 (SC)

SUPREME COURT OF INDIA

Principal Commissioner of Income-tax

v.

Jupiter Capital (P.) Ltd.

JANUARY 2, 2025

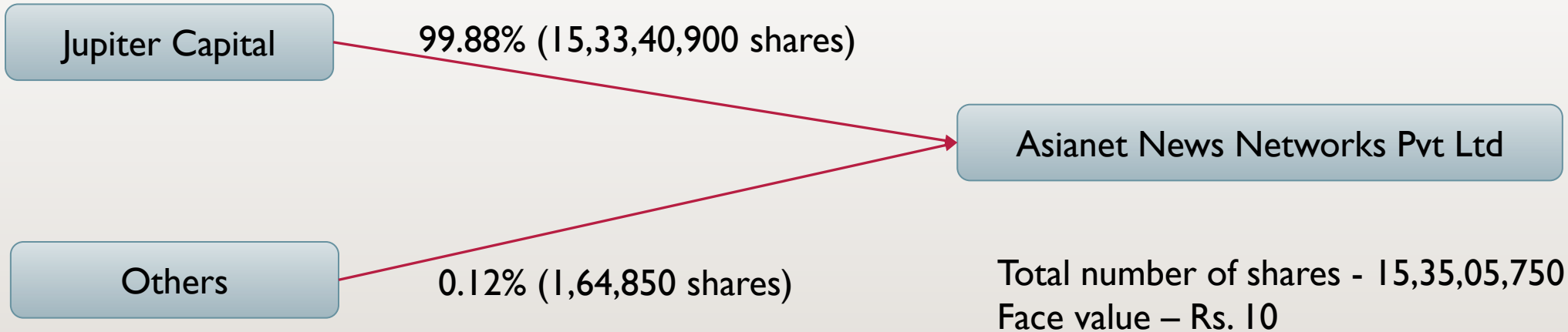
LEVEL OF APPEAL:

	Level	Result
1st Appeal	CIT (Appeals)	In favour of Revenue
2nd Appeal	ITAT	In favour of Assessee
3rd Appeal	High Court of Karnataka	In favour of Assessee
4th Appeal	Supreme Court	In favour of Assessee

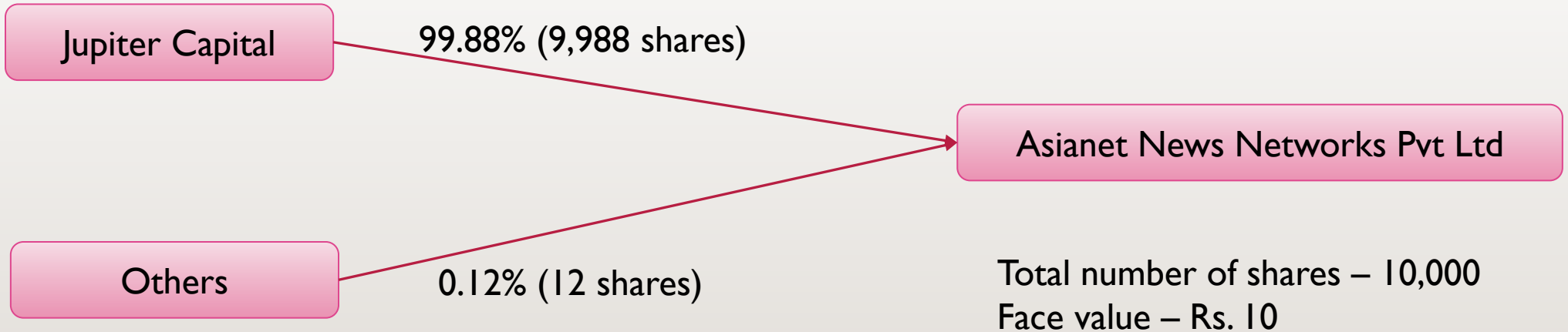
BACKGROUND OF THE CASE

- Jupiter Capital made investment in an Indian Company engaged in the business of telecasting news.
- Shareholding of Jupiter Capital was 15.33 crores shares constituting 99.88% of the total number of shares of the Company.
- The company incurred losses and hence, capital was reduced from 15.33 crores shares to 9,988 shares.
- The face value of shares remained the same at Rs. 10.
- The Court directed the company for payment of Rs. 3.18 crores to the Assessee as a consideration.
- During the year, the Assessee claimed long-term capital loss accrued on the reduction in share capital of such company treating such reduction as transfer u/s 2(47).
- The Assessing officer denied claim for such loss claiming reduction in shares of the subsidiary did not amount to a "transfer" of a capital asset u/s 2(47).

CAPITAL BEFORE REDUCTION OF SHARE CAPITAL:



CAPITAL AFTER REDUCTION OF SHARE CAPITAL:



REVENUE'S ARGUMENT

- While the number of shares reduced, the face value per share and shareholding percentage remained unchanged.
- The AO argues that there was no extinguishment of shareholder rights—only a reduction in quantity, not in ownership rights or value per unit.
- Merely using the term "extinguishment" in legal documents or court orders does not equate to extinguishment of rights under Section 2(47).
- Extinguishment of rights means the assessee must have either sold the shares or given them up to someone else.

REVENUE'S ARGUMENT

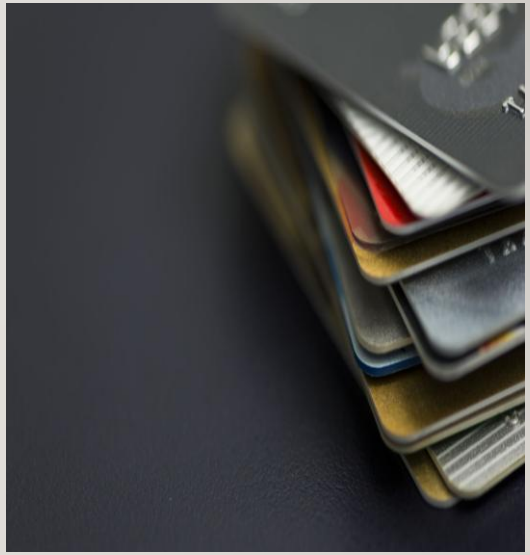
- In this case, the Assessee did not sell or transfer the shares to anyone.
  Even after the reduction in the number of shares, the ownership percentage stayed the same.
  So, there is no real loss of rights.
- Hence, this does not constitute a "transfer", and therefore capital loss is not allowable.

KEY LEGAL QUESTION

Whether reduction in share capital of company along with propotionate reduction in share capital of shareholder amounts to transfer as per section 2(47)?

RELEVANT PROVISION

- Section 2(47)
- "transfer", in relation to a capital asset, includes,—
  - the sale, exchange or relinquishment of the asset ; or
  - *the extinguishment of any rights therein.*



DECISION OF SUPREME COURT [IN FAVOUR OF ASSESSEE]

- The Assessee originally held 15.33 crore shares, which were reduced to just 9,988 shares after the capital reduction.
- This resulted in the extinguishment of rights over 15.33 crores shares, and in exchange, the Assessee received 9,988 shares of ₹10 each along with ₹3.18 crores in cash, indicating a transfer of capital asset under Section 2(47).
- The AO's view that the voting power has not changed as the percentage of Assessee's share of 99.88% has remained unchanged is untenable because if the shares are transferred at face value, the redeemable value would be Rs. 99,880/- whereas the value of 15.33 crores number of shares would have been Rs.1,53,30,57,500/-.
- It was held that the reduction in share capital of the subsidiary company and subsequent proportionate reduction in the shareholding of the Assessee would be squarely covered within the ambit of the expression "sale, exchange or relinquishment of the asset" used in section 2(47).

DECISION OF SUPREME COURT [IN FAVOUR OF ASSESSEE]

- Under Section 2(47) of the Income Tax Act, the term "transfer" is defined broadly and includes not only the sale of a capital asset but also the relinquishment or extinguishment of any rights in it.
- Therefore, even if a person continues to be a shareholder after a company's reduction of share capital, it cannot be said that no part of their rights has been extinguished.
- The law recognizes that capital gains can arise not just from an outright sale, but from any act that results in the transfer of rights in a capital asset.
- As a result, any profit or gain arising from such a transfer is taxable under Section 45, even if there is no sale involved and hence, loss is also to be allowed.

HIGH COURT OF BOMBAY

Technova Imaging Systems Limited

v.

Deputy Commissioner of Income-tax

APRIL 09, 2025

LEVEL OF APPEAL:

Appeal	Level	Result
1st Appeal	CIT (Appeals)	In favour of Assessee
2nd Appeal	ITAT	In favour of Revenue
3rd Appeal	High Court of Bombay	In favour of Assessee

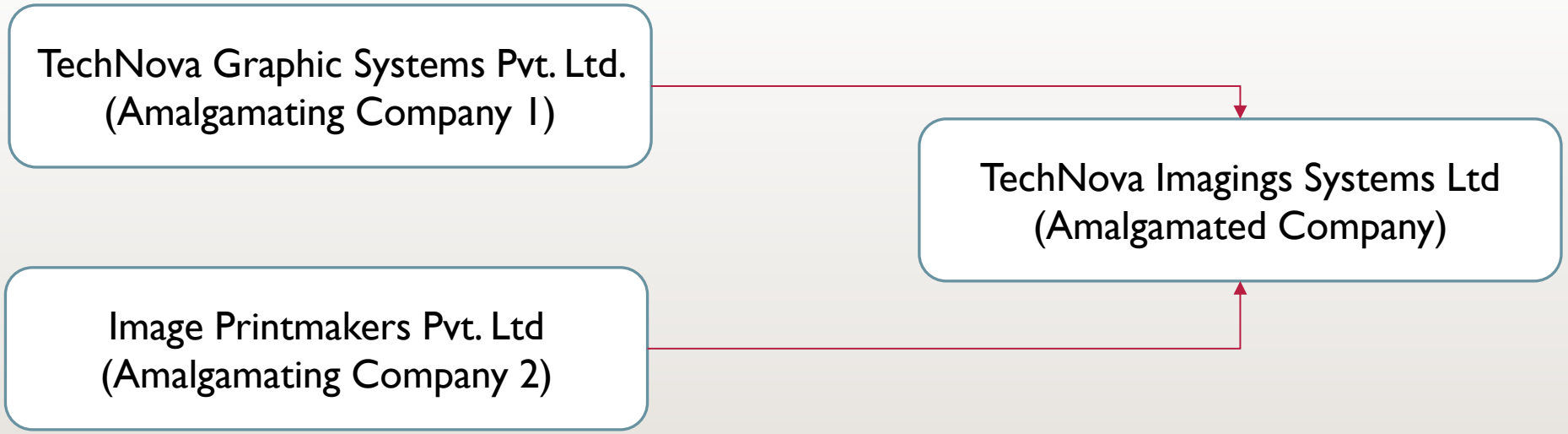
BACKGROUND OF THE CASE:

Nature of Business:

The appellant, TechNova Imaging Systems Limited (the amalgamated company), was engaged in the manufacture and sale of aluminium-based presensitised lithographic plates, chemicals, and polyester-based reprographic films used in printing and image transfer industries.



AMALGAMATION DETAILS:



BACKGROUND OF THE CASE:

- Both the amalgamating companies had unabsorbed depreciation at the time of amalgamation.
- The amalgamated company did not claim the carry forward of this unabsorbed depreciation under Section 72A as it was not able to do so in terms of provision contained in the section.
- According to Assessee, benefit under section 72A was not available as none of the amalgamating companies namely TechNova Graphic Systems Pvt. Ltd. and TechNova Imaging Systems Limited were financially viable.
- Instead, it recomputed the WDV of the transferred assets by adding back the unabsorbed depreciation of amalgamating companies and depreciation was claimed on this enhanced WDV.

BACKGROUND OF THE CASE:

- This re-computation of WDV was based on Explanation 2 to Section 43(6) of the Income Tax Act, which defines WDV.
- The AO however, restricted the depreciation claim by taking WDV which excluded the unabsorbed depreciation amounting to Rs. 48,85,213/- of amalgamating companies.

REVENUE'S CONTENTION

- The AO insisted that such benefit can only be claimed under Section 72A in the form of carry forward of unabsorbed depreciation, which requires a specific order from the Central Government, which was not obtained.
- The AO rejected adding unabsorbed depreciation of amalgamating companies to the WDV of assets, holding that allowing this recomputed WDV effectively allows the appellant to claim depreciation indirectly, amounting to carry forward of unabsorbed depreciation.
- Therefore, the AO restricted the depreciation claim by taking WDV of amalgamating companies, excluding the unabsorbed depreciation amounting to Rs. 48,85,213/-.

ASSESSEE'S CONTENTION

- No carry forward of unabsorbed depreciation was claimed under section 72A of the Act as the provision was not applicable to the facts of its case because various conditions contained in the section for such carry forward were not satisfied which included conditions like
  - amalgamating companies are not financially viable immediately before amalgamation and
  - The amalgamation is in the public interest.
- Assessee was only computing depreciation based on enhanced WDV duly calculated by adding unabsorbed depreciation to it in accordance with provisions of explanation 2 to Section 43(6) which requires only depreciation '*actually allowed*' to be reduced from the WDV of assets of amalgamating company.
- Since, this unabsorbed depreciation was never actually allowed, it need not be reduced from WDV in order to arrive at actual cost in the hands of amalgamated company.

Relevant provisions of the Act [AY 1992-93]

Section 72A relevant to AY 1992-93:

- If a company that owns an industrial business amalgamates with another company, and the Central Government (based on a recommendation) is satisfied that:
  - The amalgamating company was not financially viable before the amalgamation because of losses, debts, or other factors;
  - The amalgamation is in the public interest; and
  - Any other conditions (as specified by the Government) are also met to ensure that the merger helps revive or rehabilitate the business,

→ then, the accumulated losses and unabsorbed depreciation of the merging company would be deemed to be the losses and unabsorbed depreciation of the amalgamated company.

Note: Under the current provisions, Section 72A does not include any of the three conditions specified above. Therefore, carry forward and set-off of losses is permitted even if none of those conditions are fulfilled.

Relevant provisions of the Act [AY 1992-93]

Section 32(2): Unabsorbed depreciation can be carried forward to subsequent years until it is fully utilised.

Section 43(6):

- **Explanation 2:** If any block of assets is transferred from amalgamating company to the amalgamated company during an amalgamation, then the actual cost of the block of assets for the amalgamated company will be
  - the WDV of the block of assets of the amalgamating company for the immediately preceding previous year.
  - reduced by the amount of depreciation that was '*actually allowed*' to in the said preceding previous year.

- **Explanation 3:** Any allowance in respect of any depreciation carried forward under sub-section (2) of section 32 shall be deemed to be depreciation "*actually allowed*"

KEY LEGAL QUESTIONS

- Whether Section 72A of the Income Tax Act, 1961 is applicable to this amalgamation?
- Whether the unabsorbed depreciation of the amalgamating companies can be added for the purpose of computing written down value (WDV) of amalgamated company in terms of explanation 2 to Section 43(6)?
- Whether the appellant's depreciation claim on the enhanced WDV is valid under the provisions of Section 32 read with Section 43(6)?

DECISION OF HIGH COURT [IN FAVOUR OF ASSESSEE]



- The Court held that the Assessing Officer's discussion on the applicability of Section 72A of the Income-tax Act, 1961 was misplaced, as the said provision pertains to the carry forward and set-off of accumulated losses and unabsorbed depreciation in cases of amalgamation. However, in the present case, the Assessee was not seeking any benefit under Section 72A, nor attempting to carry forward or set off unabsorbed depreciation.
- The Assessee's claim was limited to the **adoption of the correct WDV** of the block of assets pertaining to the two amalgamating companies, which had merged into the amalgamated company pursuant to a scheme of amalgamation.
- Accordingly, the applicability of Section 72A was irrelevant to the matter.
- The real issue that required adjudication was the correctness of the WDV adjustment claimed by the Assessee. The relevant provisions governing such adjustment were contained in Section 32 read with Section 43(6), including Explanations 2 and 3 thereto, of the Income-tax Act.

DECISION OF HIGH COURT [IN FAVOUR OF ASSESSEE]



- **Non-Applicability of Section 32(2):** Since the amalgamating Companies have merged with the amalgamated Company, they cease to exist and hence they can not carry forward the unabsorbed deprecation as allowed under Section 32(2). Hence, this section breaks down.

- **Non-Applicability of Explanation 3 to Section 43(6):** This explanation states that when any allowance for depreciation is carried forward, it is deemed to be depreciation *actually allowed*. As, no unabsorbed depreciation is being carried forward in terms of section 32(2), such depreciation can not deemed to be 'actually allowed'.

- **Applicability of explanation 2 to Section 43(6):** As per this explanation in order to determine actual cost of assets in the hands of amalgamated company, the WDV in the hands of amalgamating companies shall be reduced by the depreciation *actually allowed*. As such, since the unabsorbed depreciation was never '*actually allowed*' this depreciation shall be added back to the WDV.

DECISION OF HIGH COURT [IN FAVOUR OF ASSESSEE]



The Court held that the Tribunal was wrong in law to say that the amalgamated company could not adjust the written down value of the assets of the amalgamating companies based on the depreciation actually allowed to them, just because it did not obtain approval from the Central Government under Section 72A of the Act as the assessee was not claiming any benefit under section 72A and hence provision of section 72A are not to be discussed in the case of the Assessee.

[2025] 171 taxmann.com 693 (Karnataka)

HIGH COURT OF KARNATAKA

Deputy Commissioner of Income-tax (International Taxation)

v.

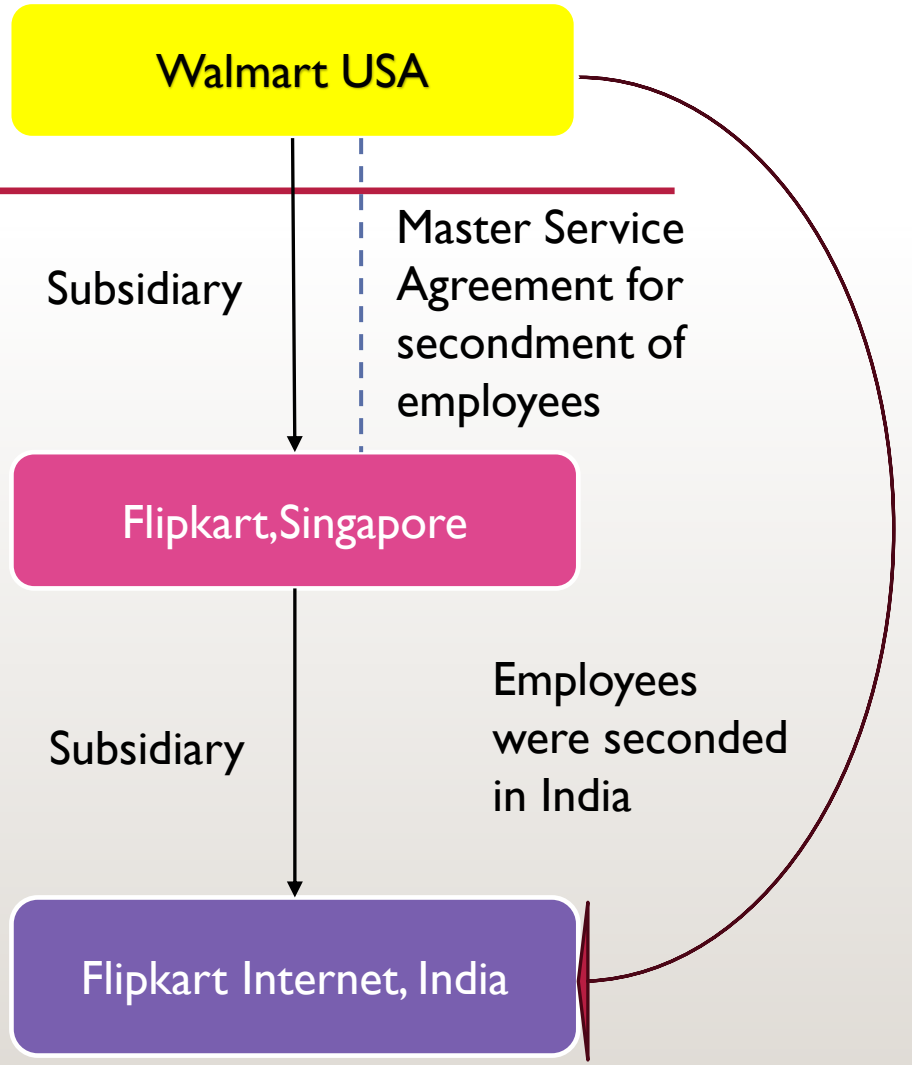
Flipkart Internet Pvt Ltd.

FEBRUARY 12, 2025

LEVEL OF APPEAL:

	Level	Result
1st	Application u/s 195(2) for Nil TDS -AO	In favour of Revenue
2nd	High Court of Karnataka	In favour of Assessee

BACKGROUND OF THE CASE



BACKGROUND OF THE CASE

- Walmart USA provided secondment of employees services to various affiliates across the globe pursuant to Master Service Agreement.
- MSA states Walmart USA will invoice only compensation & wage costs of secondees.
- Accordingly, the Walmart USA had seconded four employees to the Flipkart Internet, India by virtue of Global Work Assignment.
- Appointment letters issued with Job roles, PF contributions and Employment visa details.
- Secondees Worked Exclusively for Flipkart India during the period.
- Initially, for the seconded service, the Flipkart Internet remitted the salary amount to Walmart USA by way of reimbursement (actual cost) after deducting applicable TDS.

BACKGROUND OF THE CASE:

- Thereafter, Flipkart Internet applied for Nil TDS certificate u/s 195(2) of the Act claiming the payments made to Walmart Inc. were not for any service, but merely a reimbursement of salary and employment-related costs which were not liable for TDS deduction.
- The AO rejected the application holding that the payments were taxable as FTS and thus subject to TDS.
- Flipkart Internet challenged this rejection through a writ petition filed in the High Court of Karnataka.

KEY LEGAL QUESTION

- Whether the reimbursement of salary costs by Flipkart Internet (Assessee) to Walmart Inc. (USA entity) for seconded employees constitutes:
  - Reimbursement of salary (non-taxable), or
  - Payment for Fee for Technical Services (FTS)/Included Services (FIS) under Section 9(1)(vii) of the Income Tax Act, read with Article 12 of India-USA DTAA, and hence taxable in India.

REVENUE'S ARGUMENT

- The employer-employee relationship continued between seconded employees and Walmart, USA, not the Flipkart Internet, India.
- Therefore, the payment made by Indian company is not reimbursement of salary.
- Instead, it is treated as consideration for technical services rendered by Walmart USA under Section 9(1)(vii) of the Income Tax Act.
- Therefore, the payments made by the Indian Assessee to Walmart USA were characterized as "fees for technical services" (FTS) as per:
    - Section 9(1)(vii) of the Income Tax Act, and
    - Article 12 of the India-USA DTAA.

RELEVANT EXTRACT OF DTAA PROVISION

ARTICLE 12: ***ROYALTIES AND FEES FOR INCLUDED SERVICES***

- *For purposes of this Article, "fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services :*

- ***make available*** *technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design*

RELEVANT EXTRACT OF INCOME TAX ACT

SECTION 9:

The following incomes shall be deemed to accrue or arise in India

(vii) income by way of fees for technical services

Explanation 2.—For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries

DECISION OF HIGH COURT [IN FAVOUR OF ASSESSEE]

- MSA clearly provides for secondment of employees.
- **Clause of MSA:** Walmart USA to invoice only compensation and wage costs of secondees. Accordingly, payments to Walmart USA were pure salary reimbursements, not income for Walmart.
- Substance Over Form to be considered.
- Global Work Assignment executed in terms of which either of the parties thereto could use the services of seconded employees.
- Employees worked under direct control of Flipkart Internet, India.
- Appointment letters issued with:
  - Job responsibilities
  - Provident Fund contributions
  - Employment visa procurement

DECISION OF HIGH COURT [IN FAVOUR OF ASSESSEE]

- All indicators show existence of an employer-employee relationship with Flipkart Internet, India and amount being paid is salary reimbursements.
- **DTAA – Article 12:** Salary payments not considered Fees for Technical or Included Services (FTS/FIS) and hence not liable for TDS deduction.
- Further, India-USA DTAA contains make available clause. Since, the employees are not making technical knowledge, experience, skill, know-how, or processes, as required by DTAA. These services can not be considered as FTS in terms non fulfilment of make available clause as well.

[2024] 166 taxmann.com 466 (Delhi)

HIGH COURT OF DELHI (Full Bench)

Hyatt International Southwest Asia Ltd.

v.

Additional Director of Income-tax

SEPTEMBER 19, 2024

LEVEL OF APPEAL:

	Level	Result
1st	DRP	In favour of Revenue
2nd	ITAT	In favour of Revenue
3rd	High Court (Division Bench)	In favour of Revenue
4th	High Court (Full Bench)	In favour of Revenue
5th	Supreme Court	Pending

BACKGROUND OF THE CASE:

- Hyatt International UAE entered into a Strategic Oversight Services Agreement (SOSA) with Asian Hotels Ltd India for a hotel owned by Asian Hotel - Hyatt Regency, Delhi.
- Services Provided included strategic planning and "Know-How" for running the hotel as a high-quality international full-service hotel.
- Hyatt International UAE claimed that income was not taxable under the Income Tax Act due to absence of a specific article in the India-UAE DTAA for taxing Fees for Technical Services (FTS).
- There was also no PE in India as the presence of the Assessee's employees in India during the relevant previous year [158 days] did not exceed the specified time of nine months under Article 5(2) of the DTAA.
- The AO held that Hyatt Hotels UAE had continuous presence in India throughout the year via its employees or other personnel, indicating existence of a PE.
- AO estimated net profit of PE at 25% of gross receipts and levied tax at 10%.

ASSESSEE'S CONTENTION



Hyatt International, UAE

SOSA

Asian Holtel Ltd, India

Hyatt International UAE entered into a Strategic Oversight Services There was no PE in India as the presence of the Assessee's employees in India during the relevant previous year [158 days] did not exceed the specified time of 9 months under Article 5(2) of the DTAA.

Further, even if there is a fixed place PE in India, no profit would be attributable to the PE as Hyatt International at the entity level (global basis) suffered loss during the year.

Accordingly, no profit was attributed to the PE in India.

Legal Reference:

Delhi High Court, Nokia Solutions and Networks OY (Dec 2022)

> "*Taxability arises only when profits accrue to the Assessee, and only to the extent attributable to the PE in India.*"

RELEVANT PROVISION OF DTAA

Article 5 – Permanent Establishment

(1) For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

(II) The term "permanent establishment" includes especially:

(a) A place of management

(b) A branch

(c) An office

(i) The furnishing of services including consultancy services by an enterprise of a Contracting State through employees or other personnel in the other Contracting State, provided that such activities continue for the same project or connected project for a period or ***periods aggregating more than 9 months*** *within any twelve-month period.*

RELEVANT PROVISION OF DTAA

Article 7 – Business Profits

(1) The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the ***PROFITS*** *of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.*

KEY LEGAL QUESTION

- Whether the Appellant has Permanent Establishment in India within the meaning of the Double Taxation Avoidance Agreement?
- Whether profit attribution to a Permanent Establishment would be warranted only if the enterprise as a whole, and the PE constituting merely a component thereof, had earned profits?

DECISION OF HIGH COURT (DIVISION BENCH) [IN FAVOUR OF REVENUE]

The Delhi High Court (Division Bench), in December 2023, had held that **Hotel premises in India constituted a Fixed Place PE** due to the following reasons:

- Assessee was actually operating the Hotel in India in each and every manner.
- The Assessee had complete control and discretion in formulating strategic plans for hotel operations.
- The SOSA agreement granted unrestricted access and control over the Hotel premises.
- The Hotel owner needed Assessee's approval to use the Hotel as collateral.
- The Assessee was involved in the recruitment and appointment of key staff, including the General Manager and expatriate personnel.
- The Assessee had a fixed place of business at its disposal throughout the year in the premises of the Hotel, including the Chambers of the Managing Director and other expatriates who were continually present.

DECISION OF HIGH COURT (DIVISION BENCH) [IN FAVOUR OF REVENUE]

- Six senior employees of the Assessee visited India and exercised supervisory control over various hotel operations.
- The Hotel premises were at the disposal of the Assessee, satisfying the Fixed Place PE test under Article 5 of the DTAA.
- In terms of OECD commentary on Article 5(1) the assessee can be said to be having a PE owning to existence of a place of business i.e. a facility such as premises, and that place was fixed and established as a distinct place with certain degree of permanence and the foreign enterprise (the assessee) is carrying the business through this fixed place i.e. the premises of the hotel.
- Article 5(2)(i) stipulates a PE in case of the furnishing of services including consultancy services provided that such activities continue for the same project or connected project for a period or periods aggregating more than 9 months within any 12 months period.
- Thus, the period of stay stipulated only in relation to invocation of Article 5(2) but not with regard to Article 5(1) of DAA. Thus, we hold that based on the DAA of Indo-UAE under Article 5(1), the assessee is having a permanent establishment in India.

REFERENCE TO THE FULL BENCH OF HIGH COURT

- While the issue regarding the existence of a PE was settled by the High Court Division Bench, the question concerning the taxability of the PE's income—particularly when the global entity is incurring losses—was referred to a larger bench of the Delhi High Court.

- This referral was made in light of the Court's reservations about its earlier ruling in *Commissioner of Income Tax (International Taxation)-2 v. M/s Nokia Solutions and Networks*.



DECISION OF FULL BENCH OF HIGH COURT (IN FAVOUR OF REVENUE)

- Article 7 of the tax treaty focuses only on income attributable to the PE, not on the global profits or operations of the multinational entity.
- The PE is treated as an independent taxable unit – its activities must be evaluated separately.
- The source State (India) has the right to tax the PE's income irrespective of overall global profitability.
- Taxation cannot depend on global income or loss at the entity level. The PE's profits must be assessed independently.



[2024] 165 taxmann.com 850 (Delhi)

HIGH COURT OF DELHI

Tiger Global International III Holdings

v.

Authority For Advance Rulings (Income-tax)

AUGUST 28, 2024

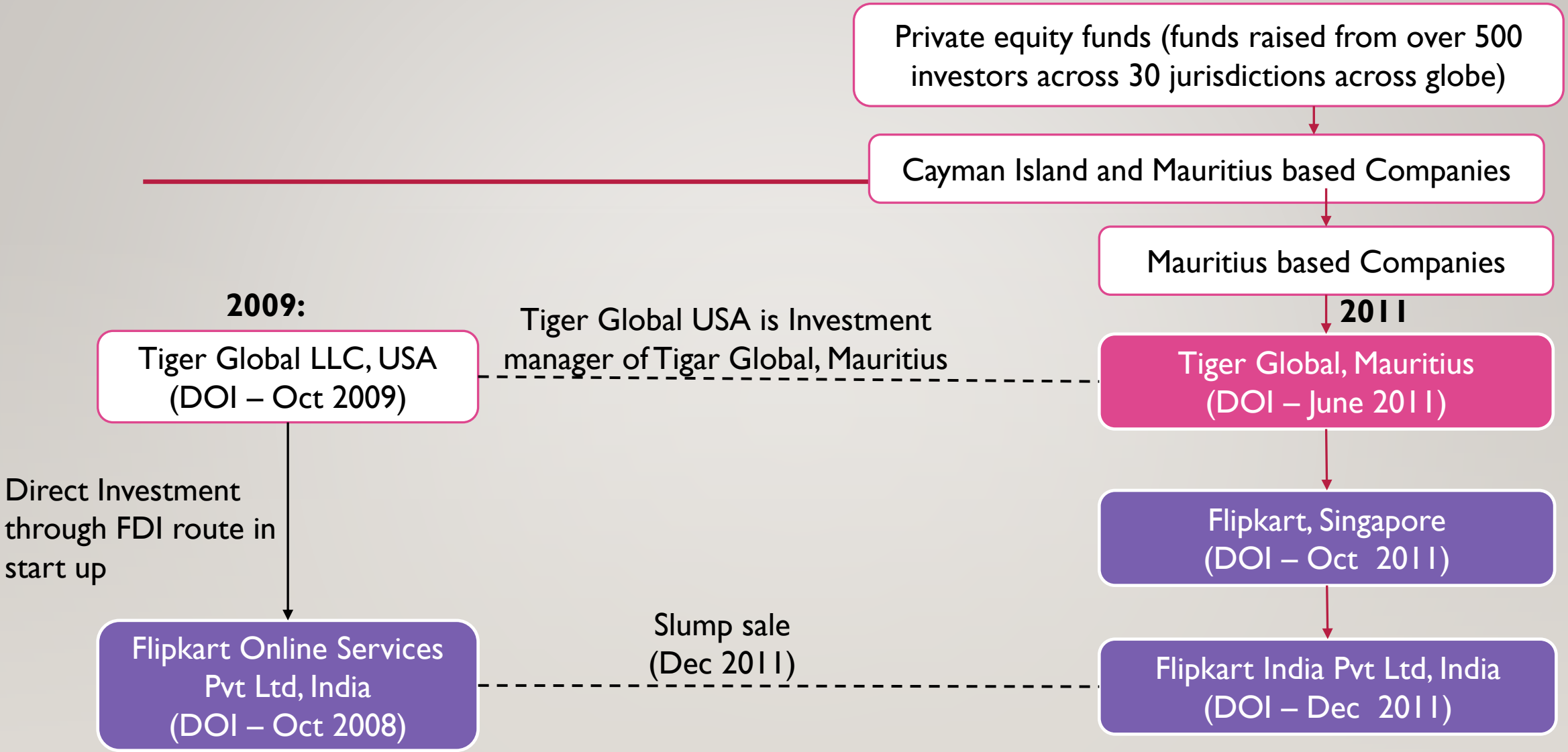
LEVEL OF APPEAL:

	Level	Result
1st	Authority of Advance rulings	In favour of Revenue
2nd	High Court of Delhi	In favour of Assessee

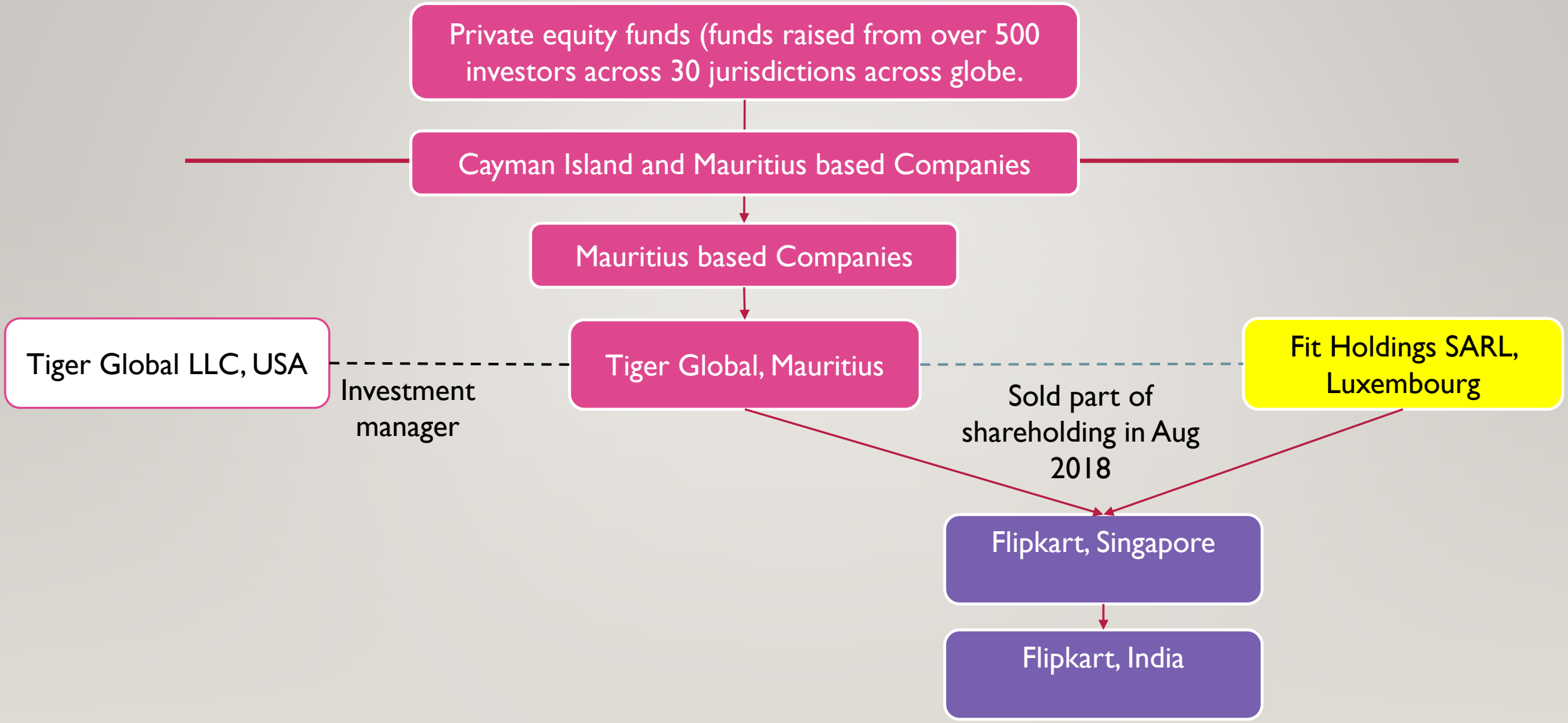
BACKGROUND OF THE CASE:

- Tiger Global Mauritius was a Mauritius-incorporated company, set up to undertake investment activities.
- Funded by 500+ investors from 30 countries via Mauritius-based shareholder entities.
- Acquired Flipkart Singapore shares between Oct 2011 - Apr 2015.
- Shares of Flipkart Singapore derived value from its subsidiary in India, i.e., Flipkart India.
- In Aug 2018, Tiger Global Mauritius sold part of its shareholding in Flipkart Singapore to a Luxembourg entity.
- Since the shares sold derived their substantial value from assets located in India, Tiger Global Mauritius approached the AAR seeking a ruling for non-taxation under the provisions of the India-Mauritius DTAA

ORGANISATION STRUCTURE BEFORE TRANSFER



ORGANISATION STRUCTURE AFTER TRANSFER



ASSESSEE'S CONTENTION FOR NON-TAXATION

Tax as per Income Tax Act: Since Flipkart, Singapore derived substantial value from Flipkart India, the capital gain from this transaction was deemed to accrue in India under Section 9 of the Income Tax Act, and thus, liable to capital gains tax in India.

Tax as per Tax Treaty: Tiger Global, Mauritius claimed the capital gain was not taxable in India under the India–Mauritius DTAA (Grandfathering clause), and hence, approached AAP for ruling.

Relevant provision of India-Mauritius DTAA

Article 13: Gains from shares acquired before 1st April 2017 shall be taxable only in the Contracting State of which the alienator (Tiger Global, Mauritius) is a resident (Mauritius).

REVENUE'S CONTENTION FOR DENYING TREATY BENEFIT AND INVOKING GAAR PROVISIONS

Tiger Global, Mauritius had no income or real business activity since it was set up.

It got money from other companies in Mauritius and Cayman Islands, all controlled by Tiger Global, USA.

Tiger Global, Mauritius is just a pass-through or conduit entity acting under the instructions of Tiger Global, USA.

The real control and benefit (Beneficial ownership) lies with the US-based parent i.e., Tiger Global, USA.

This structure appears to be set up just to avoid paying capital gains tax in India by availing India-Mauritius treat-benefits resulting in treaty abuse.

REVENUE'S CONTENTION FOR DENYING TREATY BENEFIT AND INVOKING GAAR PROVISIONS

Board members were puppets; key decisions made by people from of Tiger Global, USA.

The arrangement as designed for tax avoidance. GAAR provisions are applicable and treaty benefits are not available.

RELEVANT PROVISION

- **Provision in Income Tax Act, 1961:**
  - **Section 90(2A) -** GAAR provisions to have overriding effect over tax treaty.
- **Relevant provision of India-Mauritius treaty:**
  - **Article 13 – Capital Gains**
  - **13(3A)**: Capital Gains from shares acquired on or after 1st April 2017 in a company (Flipkart, India) which is resident of India may be taxed in India. – (Grandfathering Clause)
  - **13(4):** Gains other than that referred to in paragraphs 3A shall be taxable only in the Contracting State of which the alienator (Tiger Global, Mauritius) is a resident (Mauritius).
  - **Article 27A – Limitation of benefits**
  - **27A(1):** A resident of a Contracting State shall not be entitled to the benefits of Article 13 of this Convention if its affairs were arranged with the primary purpose to take advantage of the benefits in Article 13 of this Convention.

HIGH COURT DECISION [IN FAVOUR OF ASSESSEE]

On Management & Economic Substance:

- Tiger Global, USA was merely an investment manager, not an investor or shareholder.
- Funds came from global investors, not Tiger Global, USA.
- Petitioner companies acted as legitimate pooling vehicles, incurring expenditures satisfying LOB clause.
- BoD operated independently, with decisions collectively taken.
- Authorization of large expenditures was a Board decision, not control by Tiger Global, USA.
- No evidence of fraud, sham, or lack of economic substance.

HIGH COURT DECISION [IN FAVOUR OF ASSESSEE]

On Use of Mauritius Route

- Use of favourable jurisdictions like Mauritius cannot imply illegality or tax evasion.
- Highlighted OECD's BEPS Action Plan 6: legitimate structures should not be labelled as treaty shopping.
- Piercing corporate veil is limited to cases of fraud, sham transactions, or illegal activity.

HIGH COURT DECISION [IN FAVOUR OF ASSESSEE]

On TRC & Grandfathering Provisions

- Held valid TRC's as well as a Category 1 GBL issued by the competent authority in Mauritius.
- TRC must be considered final, validating residency and beneficial ownership.
- CBDT clarification supports TRC as sufficient proof under the India-Mauritius DTAA.
- Grandfathering clause under Article 13 exempts gains from shares acquired before 1 April 2017.
- HC ruled such gains are not taxable, rejecting applicability of GAAR.

DECISION OF COURT WITH REGARD TO LOB APPLICABILITY

- If a case of avoidance is sufficiently addressed by LOB in the treaty, there shall not be an occasion to invoke GAAR.
- India-Mauritius Treaty contains LOB clause under article 27A.
- However, nothing in LOB clause is specified with respect to gains on shared acquired up to 31st March 2017. Article 27A accordingly chose to grandfather all transactions relating to alienation of shares acquired prior to 01 April 2017 which means the gains arising on such shares will be taxable only in Mauritius and no taxability will arise in India.



DECISION OF COURT WITH REGARD TO LOB APPLICABILITY



- Further, there are specified conditions under LOB clause 27A for deeming an entity non-conduit entity as under:
    - *its expenditure on operations in that Contracting State is equal to or more than Mauritian Rs.1,500,000 or Indian Rs.2,700,000 in the respective Contracting State as the case may be, in the immediately preceding period of 12 months from the date the gains arise.*
- The expenditure incurred by Tiger Global Mauritius is exceeding these amounts specified. Hence, it can not be considered a conduit entity.
- It would be impermissible for the Revenue to manufacture additional roadblocks or standards that parties would be required to meet in order to avail of DTAA benefits.

[2024] 169 taxmann.com 145 (Ahmedabad - Trib.) (SB)

IN THE ITAT AHMEDABAD 'SPECIAL BENCH'

TBEA Shenyang Transformer Group Company Ltd.

v.

Deputy Commissioner of Income-tax, International Taxation

NOVEMBER 11, 2024

LEVEL OF APPEAL:

Appeal	Level	Result
1st Appeal	CIT (Appeals)	In favour of Assessee
2nd Appeal	ITAT Special Bench	In favour of Revenue

BACKGROUND OF THE CASE:

- TBEA, a Chinese company, entered into multiple contracts with Power Grid Corporation in India—offshore supply, onshore supply, and onshore services (each governed by separate agreements).
- For onshore services in the nature of inland transportation and civil work services, TBEA established a Project Office (PE) in India.
- The PO provided services within India.
- The HO in China had made/ received certain payments on behalf of the PO as the PO did not have a bank account in India at the relevant time. It also received payment thereafter from Power Grid Corporation. It also made payments of various expense of PO.

BACKGROUND OF THE CASE:

- The Assessing Officer regarded said payments as 'reimbursement' and termed them as 'international transaction' for the purpose of reference to TPO.
- The TPO held:
  - There was an international transaction between PE and HO.
  - PE was under-compensated and had incurred losses.
  - TP provisions apply, and ALP (Arm's Length Price) adjustments are necessary.

RELEVANT PROVISIONS OF THE INDIA-CHINA DTAA

Article 7(2) – Business Income

Where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were ***a distinct and separate enterprise*** *engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.*

RELEVANT PROVISIONS OF THE INDIA-CHINA DTAA

Article 9 – Associated Enterprises

Where—

an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or

the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State

RELEVANT PROVISIONS OF INCOME TAX ACT

Section 92A

Meaning of Associated Enterprises:

For the purposes of this section and sections 92, 92B, 92C, 92D, 92E and 92F, "associated enterprise", in relation to another enterprise, means an enterprise—

(a) which participates, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise;

RELEVANT PROVISIONS OF THE INCOME TAX ACT

Section 92B (1)



Meaning of International Transaction

International transaction" means a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises, and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility

RELEVANT PROVISIONS OF INCOME TAX ACT

Section 92B(2)



Meaning of International Transaction

A transaction entered into by an enterprise with a person other than an associated enterprise shall, for the purposes of sub-section (1), be deemed to be an international transaction entered into between two associated enterprises, if there exists a prior agreement in relation to the relevant transaction between such other person and the associated enterprise, or the terms of the relevant transaction are determined in substance between such other person and the associated enterprise where the enterprise or the associated enterprise or both of them are non-residents irrespective of whether such other person is a non-resident or not.

RELEVANT PROVISIONS OF THE INCOME TAX ACT

Section 92F

Transaction" includes an arrangement, understanding or action in concert whether or not such arrangement, understanding or action is formal or in writing.

ASSESSEE'S CONTENTION



- The transactions between the Head Office (HO) and Project Office (PO) involve only internal fund movements, not income-generating activities.
- The actual commercial transactions are between the PO and unrelated third parties in India.
- As per Section 90 of the Income-tax Act, the provisions of the DTAA override domestic law if more beneficial to the assessee.
- Under Article 9 of the India-China DTAA, transfer pricing applies only to transactions between two separate enterprises, where one is a resident of each contracting state.
- The HO and PO are not distinct legal entities, and the PO is not a resident of India for DTAA purposes.
- Therefore, transfer pricing provisions do not apply to internal dealings between the HO and PO.

REVENUE'S CONTENTION

- As per section 92B, **international transaction** means a transaction which have bearing on profits or losses between two or more associated enterprises, either or both of whom are non-residents.
- PO and HO have transaction between them which has an impact on 'income'. Both are non-residents and thus, satisfy the basic test of section 92B.
- As per Article 7(2) of the India-China DTAA and OECD commentary (paras 15–17) on Article 7, a permanent establishment (PE) must be treated as a functionally separate entity.
- Further, TP rules apply to enterprises, not necessarily to separate legal persons.
- Argument that "you can't deal with yourself" does not apply, as treaty fiction treats them as separate.
- As the HO received/ made payments on behalf of PO, at the end of the year, assessee-PE has to receive substantial amount from HO.

REVENUE'S CONTENTION

- For TP applicability, it is also required to be checked if two enterprises are associated enterprises in terms of Section 92A.
- Section 92A is not applicable to the case of the assessee as one enterprise is not participating in other enterprises as per the conditions specified therein.
- But it is to be noted that transaction between an enterprise and a person which is not an associated enterprise under section 92A, may be deemed to be transaction between associated enterprises for the purposes of section 92B(1), if the conditions contained in section 92B(2) are attracted which specifies additional conditions for treating two enterprises as AEs.
- A transaction with a non-AE is deemed an international transaction if there's a prior agreement or control over terms by an AE. As those conditions are satisfied these two are AEs.

REVENUE'S CONTENTION

- HO controls and manages the PE's funds. PE's revenue is determined by agreements signed by the HO. These factors influence the taxable income of the PE.
- **Key question**: In an independent party scenario, would an enterprise route its receipts/payments through a third party?
- As per section 92F(v), transaction includes arrangement, understanding or action in concert.
- The PE undertook loss-making obligations on behalf of HO, which points to an arrangement between associated enterprises.
- If the loss wasn't due to this arrangement, transfer pricing wouldn't apply—but that's not the case here.
- **Profits that will be attributed to PE shall be profits which the PE might be expected to make if it were a distinct and separate enterprise.**

KEY LEGAL QUESTION

- Whether or not the transactions between a foreign enterprise outside India and its Indian permanent establishment can be considered international transactions for the purpose of section 92B and, accordingly, can be subjected to the 'arm's length price' adjustment?



DECISION OF ITAT (SB) [IN FAVOUR OF REVENUE]



- Article 7(2) of the India-China DTAA states that profits attributable to a PE shall be those it might earn if it were a distinct and separate enterprise, acting independently from its Head Office.
- This hypothetical separation mirrors the arm's length principle, which underlies both Article 7(2) and Indian transfer pricing (TP) provisions.
- Both frameworks aim to assess how independent third parties would transact under uncontrolled conditions.

DECISION OF ITAT(SB) [IN FAVOUR OF REVENUE]



- Therefore, even though a PE is not legally separate from the foreign enterprise, for profit attribution under Article 7(2), it is treated as a separate entity.

- ***In the context of a PE of a foreign enterprise in India, the Article 7(2) provides that profits that will be attributed to PE shall be profits which the PE might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a PE.***

DECISION OF ITAT (SB) [IN FAVOUR OF REVENUE]

- On this basis, reimbursements between the foreign HO and its Indian PE can be viewed as "international transactions" and subject to ALP adjustments, in line with TP principles.



Thank You!!



IN THE ITAT CHENNAI 'DIVISION BENCH'

Sanmina-SCI India Pvt. Ltd.

v.

Deputy Commissioner of Income-tax

SEPTEMBER 11, 2024

LEVEL OF APPEAL:

Appeal	Level	Result
1st Appeal	CIT (Appeals)	In favour of Revenue
2nd Appeal	ITAT Special Bench	In favour of Assessee

BACKGROUND OF THE CASE:

- Assessee (Indian Company) is engaged in business of providing services related to back office.
- Assessee had outstanding receivables amounting to Rs.4,51,91,92,969/- at the end of the year i.e.31.03.2013.
- The receivables declared by the Assessee from AEs and non-AEs was Rs.402,84,97,855/- and Rs.49,06,85,114/- respectively.
- The TPO calculated interest on receivables outstanding beyond credit period from AEs for a sum of Rs.19,32,09,242/- and accordingly, made addition.

ASSESSEE'S CONTENTION

- Working capital adjustments already factor in the interest component due to delayed receivables. Hence, a separate adjustment would lead to double counting.
- Working capital adjustments are for "fine-tuning margins" and improving comparability.
- The assessee relied on the Delhi High Court judgment in *Kusum Healthcare Pvt. Ltd.*, which held that:

  "*Merely having receivables beyond the credit period doesn't automatically make it an international transaction unless there is clear evidence that the arrangement was to benefit the AE*".

REVENUE'S CONTENTION

- Outstanding receivable beyond credit period is an interest free loan to AE and is to be treated as separate international transaction as per explanation to section 92B. These receivables should be benchmarked separately.
- The working capital adjustment is meant to account for differences in working capital deployment between the tested party and the comparables, but not specific interest cost on delayed receivables.
- Interest on outstanding receivables is separately quantifiable and thus should not be considered part of broader working capital adjustment.

KEY LEGAL QUESTIONS

Whether interest on outstanding receivables from AEs should be treated as a separate international transaction and attract a TP adjustment, or whether this adjustment is subsumed within the working capital adjustment already made?

DECISION OF ITAT (SB) [IN FAVOUR OF ASSESSEE]

- The working capital adjustment is used to align the margins of the tested party and the comparables.
- If interest impact is already captured here, then no separate interest adjustment should be made.
- There must be a clear pattern or intent to benefit AEs through extended receivables to classify it as a separate international transaction.
- The Assessee's operating margin (3.20%) was already higher than the adjusted average margin of the comparable companies (1.75%), post working capital adjustment.
- Therefore, no further adjustment was warranted, especially in the absence of evidence showing that receivables were extended intentionally to benefit the AE.
- The Tribunal agreed with the Delhi High Court's view in *Kusum Healthcare*.

[2024] 165 taxmann.com 494 (Delhi)

HIGH COURT OF DELHI

Commissioner of Income-tax-International Taxation-1

v.

A.T. Kearney Ltd.

JULY 11, 2024

LEVEL OF APPEAL:

Appeal	Level	Result
1st Appeal	CIT (Appeals)	Partially in favour of Assesee
2nd Appeal	ITAT Special Bench	In favour of Assessee
3rd Appeal	High Court	In favour of Assessee

BACKGROUND OF THE CASE:

- ATK India is a management consulting company providing services such as finance management, CEO office services, and professional development to multinational enterprises.
- ATK US, as the global operational headquarters, provides these services to ATK India, charging a cost-plus 10% markup for these services.
- The assessee adopted TNMM for ALP analysis, with the operating margin being 10%, which was at arm's length.
- The TPO determined the arm's length price of these services as Nil and made additions.

REVENUE'S ARGUMENT

- The TPO stated following information is necessary:
  - Whether the AE actually received intra-group services.
  - What economic and commercial benefits the recipient derived from these services.
  - A mechanism to identify:
    - The cost incurred by the AE in providing the intra group services and
    - The basis of allocation of cost to various AEs.
  - Whether an independent enterprise would have paid for similar services in comparable circumstances.

REVENUE'S ARGUMENT

- The TPO made addition giving the following reasons:
  - No evidence that services were actually rendered.
  - No demonstration of the need or benefit of services.
  - Personnel providing services are on the AE's payroll, suggesting the work benefitted the AE more than the assessee.
  - The cost allocation method was unverified and lacked documentation.

REVENUE'S ARGUMENT



- No link between services and revenue generation.
- Services provided were duplicating in-house services already performed by the assessee.
- The ALP for the transactions was deemed NIL due to lack of substantiation.
- The arrangement was seen as a profit-shifting device without any genuine commercial basis.

KEY LEGAL QUESTIONS

- Whether the payment made for Management services (intra-group services) to AEs was allowable on the grounds of commercial expediency?
- Whether disallawnce can also be made on other critical transfer pricing factors, such as benefit test, duplication of services, or inadequate documentation?

DECISION OF HIGH COURT [IN FAVOUR ASSESSEE]

- The revenue authorities cannot dictate how a business should conduct its operations or what expenditure it can incur.
- The commercial soundness of an expenditure is not relevant in transfer pricing.
- The assessee is not required to show that the expenditure has directly resulted in profit or income in the same or subsequent years.
- Transfer pricing rules do not permit revenue authorities to substitute a legitimate business transaction with their perception of what should have been done.

DECISION OF HIGH COURT [IN FAVOUR ASSESSEE]

- It is impermissible for the TPO to disregard the actual transaction unless it concludes that an unrelated party would not have undertaken the same transaction.
- The allocation of costs to ATK affiliates and India was supported by evidence, and the cost breakup was provided in the paper book.
- The TPO cannot challenge the commercial soundness of the expenditure incurred by the assessee.

[2025] 172 taxmann.com 195 (Delhi)

HIGH COURT OF DELHI

Casio India Company (P.) Ltd.

v.

Deputy Commisisoner of Income-tax

FEBRUARY 10, 2025

LEVEL OF APPEAL:

Appeal	Level	Result
1st	DRP	In favour of Revenue
2nd	ITAT	In favour of Revenue
3rd	High Court	In favour of Assessee

BACKGROUND OF THE CASE:

- Casio India is an Indian subsidiary of "C" Ltd., Japan.
- It is engaged in distribution of products like watches, calculators, digital diaries in India. The brand name is owned by the the AE.
- It incurred Advertisement, Marketing and Promotion (AMP) expenses to promote the brand and products in India.
- The Resale Price Method was used to determine the arm's length price of distribution transactions, comparing the taxpayer's gross profit margin to that of comparable entities.

BACKGROUND OF THE CASE:

- The TPO considered these AMP expenses to be excessive and applied the Bright Line Test to determine whether a part of the AMP spend was incurred for the benefit of the foreign Associated Enterprise (AE), i.e., brand promotion of "C" Ltd.
- **The Bright Line Test** is a method used to distinguish routine advertising, marketing, and promotion (AMP) expenses from non-routine expenses by comparing them to those incurred by comparable independent companies; any excess is presumed to benefit the foreign parent and treated as a separate international transaction.

REVENUE'S ARGUMENT

- Substantial expenditure on advertisement, marketing and promotion expenses have been incurred by the Assessee company in India which has helped in creation of 'Casio' brand which belongs to its AE. Hence, this expenditure should be separately benchmarked.
- Assessee should be separately compensated for the brand-building efforts in India at a cost-plus mark-up basis.

KEY LEGAL QUESTIONS

- Whether the Advertisement, Marketing and Promotion expenses incurred would qualify as an international transaction and requires to be benchmarked?

DECISION OF HIGH COURT [IN FAVOUR ASSESSEE]



- Significant AMP expenditure in India alone does not amount to an international transaction with the AE.
- Bright Line Test has no legal validity under Indian transfer pricing law and is to be rejected.
- AMP expenses cannot be treated as a separate international transaction unless there is a specific agreement or arrangement between the assessee and the AE for incurring such expenditure in India on its behalf.
- When the Resale Price Method is applied and gross profit margins are within the arm's length range, no separate AMP adjustment is required.

DECISION OF HIGH COURT [IN FAVOUR ASSESSEE]

- Gross margins under RPM are presumed to cover routine AMP functions as part of the overall distribution activity.



Thank You!!

