



**12th NANI PALKHIVALA MEMORIAL NATIONAL TAX
MOOT COURT COMPETITION, 2016**

1st – 3rd APRIL, 2016

**IN THE HIGH COURT OF JUDICATURE AT MADRAS
(Ordinary Original Civil Jurisdiction)**

IN APPEAL NO. _____ OF 2014

IN THE MATTER OF:
The Income-tax Act, 1961

And

IN THE MATTER OF:
Section 260A of the Income-tax Act, 1961

And

IN THE MATTER OF:
Order dated 24th October, 2015 by the
Income-tax Appellate Tribunal, Chennai,
for the assessment year 2013-14.

Principal Commissioner of Income Tax ... Appellant

Versus

M/s Global Appliances India Limited... Respondent

MEMORANDUM OF APPEAL

The Appellant prefers this Appeal against the order dated 24th October, 2015 passed by the Income-tax Appellate Tribunal (hereinafter referred to as “**the Tribunal**”) for the assessment year 2013-14.

I. STATEMENT OF FACTS:

1. The Respondent, Global Appliances India Limited (GAIL), is a company incorporated in India and registered under Indian Companies Act 1956.
2. During the assessment year 2013-14, the Appellant made certain payments for consultancy services rendered by M/s Image Searcher Inc. (ISI), a limited liability company incorporated in the United States of America (USA) as per the laws of that country.
3. The tax treaty between India and USA considers a company as tax resident of USA if the company is incorporated therein. GAIL was provided with incorporation certificate of ISI. Article 12(4) of the India USA Treaty provides a narrower definition of ‘Fees for Technical Services’ (FTS). The payment to ISI was treated by GAIL as not taxable in India by applying the said Article and therefore GAIL did not deduct any tax at source thereon.
4. ISI has its Place of Effective Management (PoEM) in Germany and accordingly regarded as a resident of Germany as per the domestic laws of Germany. As per tax treaty between USA and Germany a company resident of both USA and Germany will be treated as tax resident of the state selected by Competent Authorities under a Mutual Agreement Procedure (MAP). MAP proceedings between the Competent Authorities of Germany and USA in the case of ISI concluded that ISI shall be treated as tax resident of Germany.

5. Indian tax authorities while examining the deductibility of the expense in the hands of GAIL observed that Tax Residency Certificate (TRC) has not been obtained by ISI from US tax authorities and for want of that it denied the benefit of India US tax treaty.
6. Being aggrieved by the said order, the Respondent filed appeal before CIT(A).
7. Before CIT(A) it was contended that section 90(4) which requires furnishing of TRC applies only in case of relief from double taxation [see section 90(1)(a)] but does not apply to a case of avoidance of double taxation under [see section 90(1)(b)].
8. Learned CIT(A) held that even though the absence of TRC may not disentitle ISI from claiming treaty benefit of India US tax treaty, ISI being tax resident of Germany as per MAP order, is in any case not entitled to India US tax treaty. The India Germany tax treaty does not have as narrow a definition of FTS as India USA tax treaty has, and hence tax was deductible. [Respondent admits that if India Germany treaty is applicable, then the payment would be taxable as FTS and GAIL would not have any case. The issue therefore is confined to whether India US treaty or India Germany treaty is the relevant treaty].
9. In the appeal before the Tribunal by GAIL as well by the Assessing Officer, the appeal of GAIL was allowed and appeal of Assessing Officer was dismissed, holding that:
 - The obligation incurred by India under India USA treaty is to confer certain benefits to US tax residents;
 - It is un-disputed that tax residency criteria in India US treaty includes place of incorporation as relevant criteria;

- It is also undisputed that income tax law of USA treats a company to be tax resident thereof and also liable to tax on its global income at the place of incorporation.
- The status of the Company (ISI) in USA qua India cannot be altered or ignored having regard to its status qua Germany.
- TRC is not a pre-requisite for claiming avoidance of double taxation under the India USA tax treaty

II. SUBSTANTIAL QUESTIONS OF LAW:

The Appellant submits that the following substantial questions of law arise from the Order of the Tribunal:

- (i) Whether, on the facts and in the circumstances of the case and in law, the Tribunal was right in holding India USA treaty protects the taxation of payments to ISI even absent a TRC?
- (ii) Whether, on the facts and in the circumstances of the case and in law, the Tribunal was right in holding that the taxation of payments to ISI is governed by India USA tax treaty and not India German treaty?

III. GROUNDS OF APPEAL:

That the Appellant seeks to challenge the impugned order passed by the Tribunal on the following grounds, inter- alia:-

- A. The expression 'relief' is preceded by the word 'any' and is therefore wide enough to cover even the case of avoidance of double taxation.

B. Non-submission of TRC thus dis-entitles ISI from claiming benefit under India USA tax treaty.

C. Second sentence of Article 4(1) of India USA tax treaty excludes from its ambit the companies who are not liable to a comprehensive (worldwide) tax liability in (say) USA from claiming benefits conferred to a tax resident of USA. By virtue of the PoEM of ISI being in Germany and by virtue of MAP order, ISI has ceased to be tax resident of USA.

D. The worldwide tax liability in USA is not be considered purely under the domestic law of USA as an academic issue but on ground reality after taking into account the taxing rights foregone by USA in favour of other countries by virtue of treaties entered into with them.

IV. The Appellant reserves the right to alter, modify or amend the grounds of appeal raised hereinabove.

V. The Appellant submits that the Appeal is filed within the time prescribed.

VI. The Appellant states that the Appellant is assessed to tax at Chennai. Thus, this Hon'ble Court has jurisdiction to try, entertain and dispose off the present appeal.

VII. The Appellant states that the Appellant has paid the court fees of Rs.10, 000.

VIII. The Appellant prays that:

- a. This Hon'ble Court may be pleased to admit the present appeal and after considering the aforesaid substantial questions of law to allow the appeal;

- b. This Hon'ble Court may be pleased to stay the operation of the order of the Tribunal till the disposal of this appeal.
- c. For costs of and incidental to this appeal; and
- d. This Hon'ble Court may be pleased to grant such further and other relief as it may deem fit.

Note: The Appeal has been admitted on all the questions and has been fixed for final hearing.

NANI 2016