35 to 42

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITA 851/2008, ITA 852/2008, ITA 853/2008, ITA 854/2008, ITA 855/2008, ITA 856/2008, ITA 859/2008 & ITA 860/2008**

(***Common Order***)

Date of Decision: 25th February, 2009

DIRECTOR OF INCOME TAX ..... Petitioner

Through: Mr. Sanjeev Sabharwal, Adv.

versus

GALILEO INTERNATIONAL INC. ..... Respondent

Through: Mr. Dinesh Vyas Sr. Advocate with Mr. F.V.Irani, Mr. Satyen Sethi & Mr. Johson Bara, Advocates.

CORAM:
HON'BLE MR. JUSTICE A.K.SIKRI
HON'BLE MR. JUSTICE SURESH KAIT

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

A.K.SIKRI J. (Oral)

Galileo International Inc. Ltd. (respondent herein) is a company incorporated under the laws of US. It is thus a resident of USA. It carries on the business of maintaining and operating the system for providing electronic global distribution of services to airlines, hotels, and tour and cab operators by connecting to travel agents utilizing a Computerized Reservation System (CRS).

This CRS, inter alia includes a system which receives, processes, stores and disseminates data about flight schedules, seat/room availability, fare information and provision for booking capabilities etc. The respondent has same business activities in India as well.

As noted by the Income Tax Appellate Tribunal in its impugned judgments, there are six players in the business, namely the passenger or the traveller, the travel agents, Interglobe i.e. respondent's agent in India, Sita and other travel agencies, the respondent herein and the airlines. In this behalf, the respondent has entered into an agreement with various participants known as the Participating Carrier Agreement. It has also entered into a separate agreement known as Distribution Agreement dated 25.04.1995 with Interglobe Enterprises Limited (Interglobe) for the services rendered by Interglobe under the said agreement. The respondent is paying Euro 1 for each booking to the said Interglobe from the airlines etc. with whom respondent has Participating Carrier Agreement, the respondent is paid EURO-3 for each booking.

The dispute has arisen about the assessment of its income generated in India. The Income Tax officer as well as the CIT Appeals held that part of the income is generated in India and is therefore taxable herein. The respondent filed appeals against those orders and the Income Tax Appellate Tribunal has decided these appeals in favour of the respondent vide impugned judgment dated

30.11.2007. These appeals are preferred by the Income Tax Department agains the said judgment.

A perusal of the impugned judgment of the Tribunal would reveal that after taking note of the mode of operations of the respondent through its various players as mentioned above, the following questions arose for consideration:-

> "(i) Whether the assessee has any income chargeable to tax in India u/S 5(2) of the Act and whether the assessee has any business connection in India as per Section 9(1) (i) of the Act? If yes, to what extent it is taxable in India.
>
> (ii) If the answer to Question No.1 is in affirmative, whether, in terms of DTAA between India and USA, the appellant has any PE in India?
>
> (iii) If answer to Question No.1 is in affirmative what is the extent of income in India and whether the same can be held as paid by the appellant to Interglobe and no further income is attributable to the PE in India?
> (iv) If the answer to Question No.3 above is in negative, to what extent the income arises in India which can be charged to tax in India.
>
> (v) Whether interest u/S 234A and 234 B is chargeable?"

The Tribunal thereafter took up for consideration those questions and discussed them in detail. In respect of question No.1 the Tribunal opined that respondent's income was chargeable to tax in India under Section 5 (2) of the Income Tax Act as it had business connections in India as per Section 9(1) (i) of the said Act. While discussing the extent to which it is taxable, the

Tribunal was of the opinion that 15% of the revenue accruing to the respondent in respect of bookings made in India should be treated as Income accruing or assessed in India and chargeable under Section 5 (2) read with Section 9 (1) (i) of the Act. Since the respondent is charging Euro-3 per booking as noted above, 15% thereof would come to 0.45 Euro. Thereafter, it dealt with the question as to how much income tax from the above is consumed by payments made to the agents in India. Taking note of the fact Interglobe is paid one Euro per booking, the Tribunal concluded that after paying the said commission, there is no income or profits which is charged to tax in India.

It is not necessary to discuss the findings of the Tribunal in respect of other issues framed by the Tribunal. Suffice is to mention that the Tribunal has returned the findings of fact that the respondent has its permanent establishment in India and in this behalf following findings are returned:-

> "17.1 In the present case it is seen that the CRS, which is the source of revenue is partially existent in the machines namely various computers installed at the premises of the subscribers. In some cases, the appellant itself has placed those computers and in all the cases the connectivity in the form of nodes leased from SITA are installed by the appellant through its agent. The computers so connected and configured which can perform the function of reservation and ticketing is a part and parcel of the entire CRS. The computers so installed require further approval from appellant/Interglobe who allows the use of such computers for reservation and ticketing. Without the authority of appellant such computers are not capable of performing the reservation and ticketing part of the CRS system. The computer so installed cannot be

shifted from one place to another even within the premises of the subscriber, leave apart the shifting of such computer from one person to another. Thus the appellant exercises complete control over the computers installed at the premises of the subscribers. In view of our discussion in the immediately preceding paragraph, this amounts to a fixed place of business for carrying on the business of the enterprise in India. But for the supply of computers, the configuration of computers, the configuration of computers and connectivity which are provided by the appellant either directly or through its agent Interglobe will amount to operating part of its CRS system through such subscribers in India and accordingly PE in the nature of a fixed place of business in India. Thus the appellant can be said to have established a PE within the meaning of paragraph 1 of Article 5 of Indo-Spain Treaty."

We may also observe that while adopting the above said approach the Tribunal has referred to Circular No.23 of 23.07.1969 and judgment of Supreme Court in the case of ***Morgan Stanley & Co. 292 ITR 406***.

The submission of Mr.Sabharwal, learned counsel for the appellant is that the Tribunal has committed a serious error in attributing revenue while arriving at the findings that 15% of the said revenue to be attributed to the respondents in respect of bookings made, whereas the criteria as laid down in the aforesaid circular as well as the Double Tax Avoidance Agreement (DTAA) with USA also enumerates the concept of attribution of "profits" and not" revenue."

This contention of learned counsel for the appellant may appear to be attractive in the first blush. However, when we go through the findings as

recorded by the learned Tribunal, we find that the test which is adopted is th attribution of profits and not the revenue.

While deciding first question namely whether any income of the respondent is chargeable to tax in India and if yes, to what extent. The Tribunal giving its findings that business income of the respondent, though a non-resident is taxable in India as it has business connections in India. The Tribunal discussed the extent of such income which is taxable in India. In that behalf the first exercise which they undertook was to assess the revenue which could be attributed to operations in India and thereafter the Tribunal had gone through the discussion on profits. This would be manifest from the reading of para-9 of the impugned judgment wherein the question is formulated in the following manner: -

> *"The next question, therefore, arises is whether having held that there is business connection in India, how much income is chargeable to tax in India".*

The Tribunal thereafter discussed the principle which is to be followed in apportioning the income tax accruing in India and the Income accruing outside India. The Tribunal found that only a part of CRS order operates and functions in India. The extent of working in India is only to the extent of channelizing the request and receiving the result of the process in India and the major functioning and collecting the data base of various airlines and hostels which

have entered into PCA with the respondent takes place outside the India. Th Tribunal also took into consideration the fact that the computer of Denver at USA processes various data like schedule of flights, timings, pricing, the availability, connection, meal preference, special facility, etc. and that too on the basis of neutral display real time on line takes place outside India. In so far as the role played in India is concerned, that is limited to the computers at the desk which are merely connected or configured to the extent that it can perform a booking function but are not capable of processing the data of all the airlines together at one place. The Tribunal was also influenced by another important fact viz. such functioning requires huge investment and huge capacity which is not available in the computers installed at the desk of the subscriber in India. On this basis, the Tribunal formed the opinion that major part of the work are processed at the host computer in Denver in USA and the activities in India are only minuscule portion. Taking into consideration all these factors the Tribunal was of the opinion that one could reasonably attribute 15% of the "revenue" accruing to the respondent in respect of bookings made in India as major expenses in that behalf is incurred in activities carried out in US. The relevant portion of the discussion arriving at the aforesaid figure is reproduced below:-

> "Though no guidelines are available as to how much should be the income reasonably attributable to the operations carried out in India, the same has to be determined on the factual situation prevailing in each

which is manifest from the fact that before discussing this aspect it formulate the question as under:-

"next question to be decided if it is found that income accruing in India is concerned by payment made to agent in India, whether any income still left to be taxed in India."

Two things clearly follow from the above:

(i) The Tribunal was now addressing itself to the issue of profits.

(ii) While giving the finding of fact that 15% of the revenue can be attributed to the activities in India, the Tribunal had not taken into consideration the commission paid to Interglobe.

These observations we have made are in answer to the arguments raised by Mr. Sabharwal that when 15% of the revenue is attributed to India, the commission payable to Interglobe must have been taken into consideration and it could not be deducted. Once again, this is not the position as is clear from the discussion contained in the judgment of the Tribunal itself.

After formulating the aforesaid question, the Tribunal answered the same holding that since the revenue attributable in respect of the booking made in India is only 0.45 Euro (15% of Euro 3) and commission paid to Interglobe was Euro 1, there was no income which was taxable in India.

The Tribunal in this behalf has noted that the entire payment made by the respondent to the Interglobe has been allowed as expenses while

> case. However, broadly to determine such attribution one has to look into the factors like functions performed, assets used and risk undertaken. On the basis of such analysis of functions performed, assets used and risk shared in two different countries, the income can be attributed. In the present case, we have found that majority of the assets i.e., host computer which is having very large capacity which processes information of all the participants is situated outside India. The CRS as a whole is developed and maintained outside India. The risk in this regard entirely rests with the appellant and that is in USA, outside India. However, it is equally important to note that but for the presence of the assessee in India and the configuration and connectivity being provided in India, the income would not have generated. Thus the initial cause of generation of Income is in India also. On the basis of above facts we can reasonably attribute 15% of the revenue accruing to the assessee in respect of bookings made in India as income accruing or arising in India and chargeable under Section 5(2) read with Section 9(1) (i) of the Act."

Thus the approach adopted by the Tribunal was to first arrive at the figure relating to the revenue generated in India and abroad. It concluded that out of the revenue accrued to the respondent in respect of these bookings 15% thereof should be attributed to India, keeping in view a very minor portion of the activity being carried out here.

Thereafter the Tribunal, having regard to the provision of the Double Tax Avoidance Agreement (DTAA) and the Circular No.23, focused its discussion to the relevant consideration namely how much out of the aforesaid would be attributable "profits". The Tribunal was clearly conscious of this

computing total income of the respondent. After arriving at these findings of facts, the Tribunal referred to Circular No. 23 of 23rd July, 1969 which prescribes that no income can be further charged to tax in India. To same effect is the judgment of the Supreme Court in ***Morgan Stanley*** (Supra).

Learned counsel for the appellant had, as pointed out above, contended that the ingredients of Circular No. 23 had not been satisfied in as much as the main consideration was attribution of profits and not the attribution of income. In view of our aforesaid analysis of the judgment of the learned Tribunal, this contention is clearly misconceived.

It was next contented by the learned counsel for the appellant that the conditions stipulated in Para 6 sub para (c) of Circular No. 23 were not satisfied and, therefore, no reliance could be placed on the aforesaid circular. Said sub para (c) reads as under:-

> "Where a non-resident's sales to Indian customers are secured through the services of an agent in India, the assessment in India of the income arising out of the transaction will be limited to the amount of profit which is attributable to the agent's services, provided that (i) the non-resident principal's business activities in India are wholly channeled through his agent,(ii) the contracts to sell are made outside India, and (iii) the sales are made on a principal-to-principal-basis. In the assessment of the amount of profits, allowance will be made for the expenses incurred, including the agent's commission, in making the sales. If the agent's commission fully represents the value of the profit attributable to is service; it should prima facie extinguish the assessment."

Emphasis was on condition No.1 which mentions that "Non resident principal's business activities in India are wholly channeled through its agent". Learned counsel submitted that the respondent's activities in India were not channeled through its agent and in fact some of the activities were directly carried out by the respondent, as per the finding of the fact arrived at by the Tribunal itself.

As pointed out above, the aforesaid sub para 'c' which is titled as "Sales by Non-Resident to Indian Customer either directly or through agents". It is thus these sales by non-resident i.e. respondent herein to Indian Customer either directly or through agent which are to be taxed in the manner stipulated in the circular. The question that would fall for consideration in these circumstances is as to whether the commission paid to the agent in India is to be deducted or not. In fact there was not even a quarrel about this and the Tribunal categorically recorded that " It is also to be noted that the entire payment made by the appellant (i.e.,Galileo) to Interglobe has been allowed as expenses while computing income of the appellant."

Thus there was no dispute that even the Assessing Officer or the CIT Appeals had allowed the entire payment made by the respondent to Interglobe as commission.

Mr. Vyas, the learned senior counsel for the respondent made a statement at the Bar that Interglobe was the only agent in India and the entire

commission was paid to Interglobe only. We may at this stage refer to judgmen of the Supreme Court in the case of ***Hukam Chand Mills Ltd. v. Commissioner of Income Tax, Bombay 103, ITR 548.*** In that case, the Supreme Court laid down the principle of apportioning the profits by a non-residents in India in the following terms:-

> " Nothing has been urged before us either on behalf of the assessee-appellant or on behalf of the revenue-respondent to assail the finding of the Tribunal in the supplementary statement of case. The question as to what proportion of the profits of the sales in categories (a), (b),(c) and (d) arose or accrued in British India is essentially one of the fact depending upon the circumstances of the case. In the absence of some statutory or other fixed formula, any finding on the question or proportion involves some element of guess work. The endeavour can only be approximate and there cannot in the very nature of things be great precision and exactness in the matter. As long as the proportion fixed by the Tribunal is based upon the relevant material, it should not be disturbed. "

We, therefore, are of the opinion that no question of law arises in these matters which needs any further determination by this Court. These appeals are accordingly dismissed *in limine*.

A.K.SIKRI, J

SURESH KAIT, J

February 25, 2009
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