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

% ***Date of Decision: 31.07.2019***

\+ **EX.P. 75/2015 & EX.APPL.(OS) Nos.1216-17/2015**

GLENCORE INTERNATIONAL AG ..... Decree Holder

Through : Mr. Gourab Banerji, Sr. Adv. with Mr. Prashant Pakhiddey, Ms. Shivi Sethi, Mr. Subhro P. Mukherjee and Ms. Raka Chatterjee, Advs.

versus

DALMIA CEMENT (BHARAT) LIMITED .... Judgement Debtor

Through : Mr. D. Kishore Kumar, Adv. for Mr.Ashish Dholakia, Adv. for judgment debtor.
Mr. Ajit Sharma, Mr. Ashutosh Senger, Mr. Adnan Siddiqui and Ms.Adeeba Mujahid, Advs. for Income Tax Department.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J. (ORAL)

1. *Via* the captioned execution petition, the decree holder seeks execution of a foreign award dated 17.11.2014.

2. The record shows that the judgment debtor had filed objections under Section 48 of the Arbitration and Conciliation Act, 1996 (in short "1996 Act"). This court dismissed the objections *vide* judgment dated 03.07.2017.

3. The judgment debtor had carried the matter in appeal right up to the Supreme Court. The Supreme Court, vide order dated 23.08.2017 passed in Special Leave Petition (Civil) No.20759-20761/2017 (SLP), dismissed the SLP. Consequently, the judgment of this court dated 03.07.2017 stands sustained.

4. The record also shows that pursuant to the order passed by this court dated 25.08.2017, the judgment debtor deposited the entire decretal amount along with interest up to the date of the deposit i.e. 17.11.2017, a part of which was released vide order dated 17.12.2018. It is pertinent to note that the total amount deposited by the judgment debtor on 17.11.2017 with the Registry of this Court was a sum of Rs. 37,20,13,028/-. The order of release, which was passed, as indicated above, on 17.12.2018, in effect, required the Registry to release a sum of Rs. 20,20,22,530/-. This order was passed in the decree holder's application being I.A. No. 528/2018. A perusal of the order dated 17.12.2018 would show that the balance amount was withheld towards withholding tax.

4.1. To give effect to this order, the matter was placed before the Joint Registrar (Judicial) on 7.1.2019. The Joint Registrar (Judicial) correctly appreciated the fact, though not articulated in his order, that an inadvertent typographical error had crept in paragraph 1 of the order dated 17.12.2018. The amount of tax withheld was noted as Rs. 20,20,22,530/-. Since the prayer made in the application I.A. No. 528/2018 was also extracted in paragraph 4 of the order, it perhaps became clear to the Joint Registrar (Judicial) that the amount directed to be released was in fact Rs. 20,20,22,530/-. The order dated 17.12.2018 shall stand corrected to that limited extent.

4.2 It is in this background that the decree holder now has approached this Court for release of the balance sum equivalent to Rs.16,99,90,498/- along with accrued interest.

4.3 As is obvious, from the discussion above, the balance amount was kept back to ascertain the view of the Income Tax Department as to whether the decree holder could be called upon to pay withholding tax.

5. Mr. Ajit Sharma, Advocate, who appears on behalf of the income tax department, has adverted to the affidavit of Dr. Prabha Kant, Commissioner of Income Tax (International Taxation) – 1. To be noted, the copy of the affidavit handed over to me in Court is undated and does not bear the signatures of Dr. Prabha Kant i.e. the Deponent. On being queried, Mr. Sharma states that the contents of the affidavit handed over in Court are identical to the original affidavit which is signed by Dr. Prabha Kant i.e. the Deponent, though, inadvertently not filed.

5.1 Mr. Sharma, in support of his submissions, has relied upon the assertions made in the said affidavit. Briefly, the stand taken by the income tax department is encapsulated in the following table, which stands incorporated in Dr. Prabha Kant's affidavit:

Particulars of Award	**Total amount**	**Liability to tax and rate of tax**
Damages for Breach of Contract between "Glencore" and "Dalmia"	USD 45,73,013	This is income of Glencore International from a source in India. In absence of a PE in India, this can't be taxed as business income under the provisions of DTAA. Therefore, the nature of this income is "*income from other sources*". Under IT Act, such income is taxable at the rate of 40% plus surcharge and education cess i.e.

		42.024%. However, under the Indo-Swiss DTAA, under Article 22, "Other income" is taxable only in the contracting state of which the recipient is resident. This is subject to certain exceptions in Article 22(3) like income from lottery, crossword puzzles, card games etc., which are taxable in the contracting state in which they have arisen. That is, under provisions of Article 22(3) of the DTAA, income which is in the nature of windfall gains are taxed in the contracting state in which they have arisen. A windfall gain is income received due to an unforeseen event over which the recipient had no control. The income from the award is also in nature of a windfall gain. However, whether it falls under the exceptions of Article 22(3) is to be determined by the Assessing officer in detailed assessment under the IT Act. At this stage, it would be fair to deduct tax @ 42.024% on the award income under the provisions of the Act.
Cost of Arbitration proceedings	USD 80,440	This portion of the award is in lieu of expenses incurred by Glencore International on a number of items which mainly include costs incurred on engaging professional experts like lawyers etc. for the purposes of arbitration. Therefore, Glencore has incurred these expenses for availing services which are prima-facie technical/consultancy services which are taxable as "Fee for Technical services" under the provisions of
Legal Costs	USD 4,73,332	

		Income Tax Act as well as DTAA. The payment by Dalmia to Glencore appears as reimbursement but if we see the money flow from Dalmia to Glencore and from Glencore to legal/technical experts, this means that the source of "fee for technical services" is in India. Under the Income-tax Act such services are taxable @ 40% + surcharge and education cess i.e. 42.024%, in a case like this one. However, under the beneficial provisions of DTAA, FTS is taxable @ 10%. Considering the facts of the case and providing benefit of DTAA the decree holder, tax may be deducted on this amount @ 10%.
Interest on the above	**USD 6,36,853**	This interest income is taxable @ 40% + surcharge and education cess i.e. 42.024% as per provisions of Clause 2(b)(x) of Part II of the First Schedule of the Finance Act, 2017 prescribing the rate of deduction of tax at source in certain cases. However as per DTAA, interest income is taxable @ 10%. Considering the fact of the case and providing benefit of DTAA to the decree holder, tax may be deducted on this amount @ 10%.
Total	**USD 57,63,638**	**As per above.**

6. As would be evident, the income tax department appears to have taken a position with regard to four limbs of the aforementioned awards. The first limb pertains to the award of monies to the decree holder in respect of breach of contract. The second limb relates to costs of arbitration. The third limb pertains to legal costs. The last limb relates to interest.

7. The stand of the income tax department is that compensation received by the decree holder towards breach of contract is liable for taxation in India as it is a "windfall gain" and hence is covered under Article 22(3) of the Double Taxation Avoidance Agreement ("DTAA") subsisting between India and Switzerland.

8. Mr. Ajit Sharma, says that there is no dispute that the decree holder does not have a permanent establishment in India. The objection according to Mr. Sharma *qua* this aspect veers around Article 22(3) of the DTAA. The said article reads as follows:

> "*Article 22*
>
> ***Other Income***
>
> *1. xxx xxx xxx*
>
> *2. xxx xxx xxx*
>
> *3. Notwithstanding the provisions of paragraph 1, if a resident of a Contracting State derives income from sources within the other Contracting State in the form of lotteries, crossword puzzles, races including horse races, card games and other games of any sort or gambling or betting of any form or nature whatsoever, such income may be taxed in that other Contracting State."*

9. To my mind, even a plain reading of Article 22(3) of the DTAA shows that the amounts received by the decree holder as compensation, towards breach of contract cannot fall within its ambit. The language of Article 22(3) is unambiguous. What falls within its ambit is only income received from lotteries, crossword puzzles, races including horse races, card games and other games of any sort or gambling or betting of any nature. It is only such income which can be taxed, if at all, in India.

10. Therefore, I am not inclined to accept the stand of the income tax

department with respect to this aspect of the matter, as indicated hereinabove by me.

11. Insofar as the monies received towards arbitration costs and legal costs are concerned, the aforementioned tabular chart would show that the income tax department proceeded on completely erroneous view of the matter.

12. The income tax department has treated monies received under the award towards arbitration costs and legal costs as income of the decree holder and thereby proceeded to take the stand that the same will be taxable as "fee for technical services", both under the provisions of Income Tax Act, 1962 (in short "1962 Act") and the DTAA.

13. Clearly, nothing can be further from reality. Therefore, the stand taken by the income tax department on this score would also have to be rejected.

14. This brings me to the last aspect which relates to the interest.

14.1 Mr. Ajit Sharma, says that the taxability *qua* interest would also be the subject matter of Article 22(3) of the DTAA. In my opinion, this stand is plainly wrong. The language of Article 22(3) of the DTAA does not support the stand of the income tax department.

15. I must, however, indicate that Mr. Sharma has submitted that the assertions made in Dr. Prabha Kant's affidavit conveys only a *prima facie* view of the matter and that a final view can only be taken once assessment proceedings commence.

16. This aspect of the matter, even according to Mr. Sharma, does not concern the decree holder. Assessment proceedings, if any, can only commence against the judgment debtor i.e. the Indian entity. At that stage,

the judgment debtor would be free to take every defence that may be available to it in law including the defence that withholding tax need be deducted as the award has morphed into a decree.

16.1 I must also note that on this count Mr. Gourab Banerji, learned senior counsel, who appears for the decree holder, canvassed a similar submission and in that behalf, relied upon the following judgments:

(i) All India Reporter v. Ramachandra D. Datar, (1961) 2 SCR 773.

(ii) V.K. Dewan v. DDA, Execution Petition No. 194/2005, Delhi High Court.

(iii) Sino Ocean Limited v. Salvi Chemical Industries Limite, Chamber Summons No. 76/2013 in Execution Application (Lodg.) No. 263/2012.

(iv) American Home Products Corporation v. MAC Laboratories Pvt. Ltd. and Anr., (1986) 1 SCC 465.

(v) Islamic Investment Company v. Union of India (UOI) and Anr., 2002 (4) BOMCR 685.

(vi) S.S. Miranda Ltd. v. ShyamBahadur Singh, (1985) 154 ITR 849.

17. As correctly argued by Mr. Banerji, this aspect of the matter need not detain me in view of what is stated hereinabove by me as regards Article 22(3) of the DTAA. I may, however, note that these judgments do enunciate the principle, which is, that once a claim merges into a decree of the Court it transcends into a judgment-debt and, therefore, only those adjustments and deductions can be made which are permissible under the Code of Civil Procedure, 1908. The judgments encapsulate the theme that a decree should be executed according to its tenor unless modified by a statute such as the 1962 Act.

18. Accordingly, the Registry is directed to release the balance amount available with it along with accrued interest to the decree holder without deducting any sum towards withholding tax.

19. The captioned petition is disposed of in the aforesaid terms. Accordingly, pending applications shall stand closed.

RAJIV SHAKDHER, J

JULY 31, 2019
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