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US LIMITED LIABILITY COMPANY IS ELIGIBLE TO CLAIM INDIA-US TAX TREATY BENEFIT – DELHI ITAT

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In the case of *General Motors Company USA v Assistant Commissioner of Income Tax – Circle (International Taxation),* 2024 166 taxmann.com 170 the Delhi bench of the Income Tax Appellate Tribunal (ITAT) held that a Limited Liability Company (LLC) incorporated in USA is eligible to claim the benefits of the India-US Tax Treaty (Tax Treaty).

Background

- In the instant case, General Motors Company USA (Taxpayer), was incorporated as an LLC under US laws and held a valid tax residency certificate (TRC) issued by the US authorities.
- During the year under consideration, Taxpayer earned certain fees for included services from India which was offered to tax in India at the beneficial rate of 15% under the provisions of Article 12 of the Tax Treaty (as against 25% under the Indian tax law).
- Under Article 12 of the Tax Treaty, fees for included services received by a resident of the United States of America (US) from India, are taxable in India at the rate of 15%. In this context, a “resident” of the US is defined under Article 4 of the Tax Treaty to mean any person who, under the laws of the US, is ‘liable to tax’ by reason of his domicile, residence, citizenship, place of management, place of incorporation or any other criterion of a similar nature.
- However, the tax authorities contended that Taxpayer is a fiscally transparent entity i.e., Taxpayer is not liable to tax in US and hence, it should not be treated as a US resident for the purpose of Tax Treaty. The tax officer also contended that Article 4(1)(b) of the Tax Treaty which treats a partnership or trust as a US resident so far as the income earned by such partnership or trust is taxed in US (either in its own hands or its partners / beneficiaries) does not cover an LLC. Consequentially, Taxpayer was denied the benefit of the lower tax rate of 15% under the Tax Treaty.
- The Taxpayer filed its objections before the Dispute Resolution Panel (DRP), which affirmed the order of the tax officer. Aggrieved, the Taxpayer filed an appeal before the ITAT.

Taxpayer’s contentions

- Under the Tax Treaty, any ‘person’ who is ‘liable to tax’ in the US is treated as a US resident. The term ‘person’ includes a ‘company’ which is defined as a body corporate. In the instant case, the Taxpayer is organized as a body corporate with a separate legal existence from its owners and hence, qualifies as a ‘person’ under the Tax Treaty.
- Under US law, an LLC has the option to be treated as a corporation which is taxable in its own independent capacity or a disregarded entity or partnership wherein the income of the LLC is taxed in the hands of its shareholders / members.
- Referring to OECD and Hon’ble Supreme Court ruling in case of *Union of India vs. Azadi Bachao Andolan and Anr,* [2003] 263 ITR 706, the Taxpayer claimed that ‘liable to tax' should be inferred to mean that a person is treated as a taxable person in the relevant jurisdiction and does not require actual payment of taxes for the purpose of Article 4 of the Tax Treaty.

- The Taxpayer had furnished a valid TRC issued by the US authorities along with Form 10F in accordance with section 90 of the IT Act and hence, it was eligible to claim the benefits under the Tax Treaty.

ITAT Ruling

The ITAT ruled in favour of Taxpayer and held that the Taxpayer is a resident of the US and eligible to claim the benefit under the Tax Treaty. Key factors and observations noted by ITAT are as set out below:

- Referring to Publication 3402 of the Department of the Treasury, International Revenue Service of the Government of US on Taxation of Limited Liability Company, ITAT noted that an LLC is a business entity recognized by the laws of the US which may be classified as a partnership or a corporation for tax purposes.
- Considering that US law itself provides an option for the LLC to be classified either as a corporation or a fiscally transparent entity, confirms that an LLC is liable to tax in US. The obligation to discharge the tax liability shifts to the shareholders / members only if an LLC is treated as a partnership for US tax purpose and hence, an LLC is effectively 'liable to tax' in US.
- Based on the Instruction to file Form 6066 (required to obtain US TRC), ITAT acknowledged that under US laws a TRC is not issued to a disregarded entity with no US members/partners. However, ITAT noted that Taxpayer satisfies all the requirements of a body corporate, holds a valid TRC and hence, qualifies as a person resident of US under Article 4 of the Tax Treaty.
- Noting that Article 4(1)(b) of the Tax Treaty enables a partnership firm or trust to claim the Tax Treaty benefit to the extent of its income being taxed in US either in the hands of the partnership firm / trust or its partners/beneficiaries, the ITAT concluded that a fiscally transparent entity was already considered as 'liable to tax' albeit with conditions in these circumstances.

Comments

The issue of a fiscally transparent entity especially a US LLC being eligible to claim the benefits of Tax Treaty has been a matter of discussions in India. The ITAT considered the US filings, Organization for Economic Cooperation and Development (OECD) Commentary and relevant judicial precedents to arrive at its findings.

Importantly, the ITAT observed that the intent of the Tax Treaty is to treat fiscally transparent entity as 'liable to tax', so far as the income is taxed in US. Further, the interpretation of 'liable to tax' is also in line with the definition under Indian tax law which includes a person having an income-tax liability but who is exempted from such liability by reason of the laws of relevant country.

This is a positive ruling for US LLCs as well as fiscally transparent entities in other jurisdictions having a tax treaty with India (with similar provisions). ITAT's approach shows that a factual determination is necessary to assess the tax treaty eligibility of an entity from a holistic standpoint considering the specific provisions of the applicable tax treaty, the tax laws of respective jurisdictions and the availability of a valid tax residency certificate.

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