IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : D : NEW DELHI

BEFORE DR. B.R.R. KUMAR, ACCOUNTANT MEMBER
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No. 2359/Del/2022
Assessment Year: 2014-15

General Motors Company USA, 1209 Orange Street, Wilmington Delaware United States, ZIP CODE - 19801 (PAN: AAECG5571H)	Vs	ACIT, Circle International Taxation 1(3)(1), New Delhi – 110 002
(Appellant)		(Respondent)

ITA No. 2360/Del/2022
Assessment Year: 2015-16

General Motors Overseas Distribution Corporation, USA 2711, Centreville RoadNew Castle County, Wilmington, USA-19808 (PAN: AAECG5571H)	Vs	ACIT, Circle International Taxation 1(3)(1), New Delhi – 110 002
(Appellant)		(Respondent)

Assessee by	:	Shri Ajay Vohra, Sr. Adv., Shri Vishal Kalra, Adv., Shri SS Tomar, Adv. & Shri Sumeet Hemkar, CA
Revenue by	:	Shri Vizay B. Vasanta, CIT-DR
Date of Hearing	:	05.07.2024
Date of Pronouncement	:	05.09.2024

ORDER

PER ANUBHAV SHARMA, JM:

These appeals are preferred by the assessee against the orders of the Assessing Officer/ACIT, Circle Int. Tax 1(3)(1), New Delhi both dated

29.07.2022 relating to assessment years 2014-15 & 2015-16. Since the grounds raised in both the appeals are identical and similar, hence, the appeals were heard together and disposed of by this common order for the sake of convenience, by dealing with the facts of assessment year 2014-15 and the decision thereof will apply *mutatis mutandis* to other assessment year viz. 2015-16. Accordingly for convenience the grounds of AY 2014-15 are reproduced here-in-below:-

> *"1. That on the facts and circumstances of the case and in law, the AO has erred in assessing the total income of the Appellant for the relevant AY as INR. 52,16,17,300 to be taxed at 25% as against the same income INR 52,16,17,300 to be taxed at 15% returned by the Appellant, denying the benefit of Double Taxation Avoidance Agreement between India and USA ("DTAA").*
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> *2. That on the facts and circumstances of the case and in law, the AO has erred in initiating proceedings under section 148 of the Act, as no income chargeable to tax has escaped assessment.*
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> *3. That on the facts and circumstances of the case and in law, the assessment order is illegal and void ab initio since it has been passed without disposing off objections against the reasons for re-opening filed by the Appellant and without following the due process of law laid down by Hon'ble Supreme Court in GKN Drive Shafts (India) Ltd. vs ITO: [2003] 259 ITR 19 (SC).*
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> *4. That on the facts and circumstances of the case and in law, the AO/ DRP erred in disregarding the submissions and precedents relied by the Appellant and passing orders which are against trite settled position of law, by which Appellant is eligible to protection / benefits of the DTAA.*
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> *5. That on the facts and circumstances of the case and in law, the AO / DRP has erred in holding that since the Appellant is an LLC and not liable to tax in the US hence it is not eligible to benefits of the DTAA.*

6. That on the facts and circumstances of the case and in law, the AO/ DRP have erred in taxing the income of the Appellant at the rate of 25 percent under the Act, instead of the beneficial rate of 15 percent under the DTAA.

7. Without prejudice to above and on the facts and circumstances of the case and in law, the AO has erred in considering the income of Appellant at INR 104,32,34,600 in computation of income instead of INR 52,16,17,300 and imposing tax thereon.

8. That on the facts and circumstances of the case and in law, the AO erred in levying interest under section 234B and section 234c of the Act.

The appellant craves leave to add, alter, amend or vary any of the above grounds either before or at the time of hearing as we may be advised. The arguments taken hereinabove are without prejudice to each other."

2. The facts in brief are that the Assessee company claim to resident in USA and offered to tax income by way of receipts on account of Fees at the rate of 15%, applying the rate given in the India-USA DTAA. The AO examined the return and found that Form 3CEB of the assessee 'A', shows that the said receipts having received for AY 2014-15 from two Indian entities namely General Motors India Pvt. Ltd. and Chevrolet Sales India Pvt. Ltd. which assessee 'B' had received it from General Motros Pvt. Ltd. only. It was observed from Form 15CA, the nature of said payments is "Fees for Technical Services/Fees for Included Services". The rate of tax of FTS/FIS under section 115A of the Act during the concerned assessment year was 25%, while the treaty rate is 15%, as per Article 12 of the India-USA DTAA. On this basis, the case of the assessee was reopened and the assessee was show caused why the

income should not be taxed @25% instead of 15% for which the assessee had given a very detailed submissions to the AO and for further convenience, the relevant part of the reply dated 2.11.2020 as considered in the assessment order is reproduced herein below:-

> *"In relation to the fiscal situation relating to 'liable to tax', it is submitted that under the US income tax law, an LLC is given an option to either be taxed as a corporation or be taxed as a disregarded entity or partnership (depending on its number of members) wherein the income of the LLC is clubbed in the hands of its owner who merely discharges the tax that is assessable in the case of the LLC. n this context, it is relevant to consider the meaning of the phrase liable to tax as is interpreted under the international commentaries and more particularly in Indian judicial precedents. In this regard, it is also relevant to consider some of the cases, where Courts/ Tribunal have, in similar facts, granted the benefit of treaty eligibility in situations where the income of an entity is clubbed with that of the member for purposes of payment of tax.*
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> *While the phrase 'liable to tax' has not been defined or explained in India-US tax treaty, as per Article 4 of the Organization for Economic Cooperation and Development ("OECD') commentary 2017, a person is considered to be liable to comprehensive taxation even if a country does not in fact impose tax. Further, your goodselfs attention is drawn to the commentary of Professor Philip Baker which notes that "It seems clear that a person does not have to be actually paying tax to be liable to tax' otherwise a person who had deductible losses or allowances, which reduced his tax bill to zero, would find himself unable to enjoy benefits of the convention. It also seems clear that a person would otherwise be subject to comprehensive taxation but who enjoys a specific exemption from tax is nevertheless liable to tax; if the exemption were repealed, or the person no longer qualified for the exemption, the person would be liable to comprehensive taxation." In view of this, it is submitted that liable to tax' connotes that a person is subject to one of the taxes mentioned in Article 2 in a Contracting State and it is immaterial whether the person actually pays the tax or not.*
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> - R*eliance in this regard, is placed on the Supreme Court ruling in case of UO and Anr vs. Azadi Bachao Andolan and Anr [20131*

263 ITR 706 (SC) wherein it was observed that liability to taxation is a legal situation: payment of tax is a fiscal fact. The Court had noted that for the purpose of application of Article 4 of a tax treaty, what is relevant is the legal situation, namely liability to taxation, and not the fiscal fact of actual payment of tax. The relevant extracts of the ruling are reproduced as under:

> *"85. In Our view, the contention of the respondents proceeds on the fallacious premise that liability to taxation is the same as payment of tax. Liability to taxation is a legal situation; payment of tax is a fiscal fact. For the purpose of application of Article 4 of the DTAC, what is relevant is the legal situation, namely, liability to taxation, and not the fiscal fact of actual payment of tax. If this were not so, the DTAC would not have used the words 'liable to taxation', but would have used some appropriate words like 'pays tax' On the language of the DTAC, it is not possible to accept the contention of the respondents that offshore companies incorporated and registered under MOBA are not 'liable to taxation' under the Mauritius Income- tax Act; nor is it possible to accept the contention that such companies would not be 'resident' in Mauritius within the meaning of Article 3 read with Article 4 of the DTAC."*

- *Reliance is also placed on the decision of the Mumbai Bench of Tribunal in case of ADIT(IT) vs Green Emirates Shipping & Travels [2006] 6 SOT 329 (Mum) wherein it was observed that as long as a person has such locality related attachments to a Contracting State that attract residence type taxation, that person' is to be treated as resident and this status of being a 'resident' of the Contracting State is independent of the actual levy of tax on that person. Thus, it is submitted that being 'liable to tax' in the Contracting State does not necessarily imply that the person should actually be liable to tax in that Contracting State by virtue of an existing legal provision but would also cover cases where that other Contracting State has the right to tax such persons irrespective of whether or not such a right is exercised by the Contracting State. The relevant extracts of the ruling are reproduced as under:-*

> *"All that is necessary for this purpose is that the person should be 'liable to tax in the Contracting State by reason of domicile, residence, place of management, place of incorporation or any other criterion of similar nature' which essentially refers to the*

fiscal domiçle of such a person. In other words, if fiscal domicile of a person is in a Contracting State, irrespective of whether or not that person is actually liable to pay tax in that country, he is to be treated as resident of that Contracting State. ***The expression 'liable to tax' is not to read in isolation but in conjunction with the words immediately following it i.e., 'by reason of domicile, residence, place of management place of incorporation or any other criterion of similar nature.' That would mean that merely a person living in a Contracting State should not be sufficient, that person should also have fiscal domicile in that Country. These tests of fiscal domicile which are given by way of examples following the expression 'liable to tax by reason of' i.e. domicile, residence, place of management. place of incorporation etc. are no more than examples of locality related attachments that attract residence type taxation. Therefore, as long as a person has such locality related attachments which attract residence type taxation, that person is to be treated as resident and this status of being a resident of the Contracting State is independent of the actual levy of tax on that person.*** *Viewed in this perspective, we are of the considered opinion that being 'liable to tax' in the Contracting State does not necessarily imply that the person should actually be liable to lax in that Contracting State by the virtue of an existing legal provision but would also cover the cases where that other Contracting State has the right to tax such person – irrespective of whether or not such a right is exercised by the Contracting State. In our humble understanding, this is the legal position emerging out of Hon'ble Supreme Court's judgment in Azadi Bachao Andolan's case (supra). The plea taken by the revenue that the assessee was not liable to tax which was anyway not taken by the Assessing Officer or before the CIT(A, is also not sustainable in law either."*

- *The above principle has also been upheld by the courts in the following rulings:*
- *Mohsinally Alimohammed Rafik (1995) 213 ITR 317 (Delhi)*
- *ITO(IT) vs Ramesh kumar Goenka (TA No 3562/ Mum / 2009)*
- *Linklaters LLP vs ITO(IT) (2010) 40 SOT 51 (Mum)*
- *DDIT Vs Tekmark Global Solutions LLC [2010] 38 SOT 7 (Mum)*
- *DDIT(IT) vs Ms AP Moller (TS-555-/TAT-2013 Mum)*
- *It is further submitted that the current treatment for US federal income tax purposes for a single member LLC as a disregarded*

entity was introduced in 1996. Thus, at the time India-US tax treaty was executed (i.e. in 1989), LLC as a form of entity and the US federal income tax treatment on its income was not envisaged. The India-US tax treaty is based on 1981 US Model Convention which was formulated at a time, the US law did not recognize single member LLCs as disregarded entities for US federal income tax purposes.

- *In the technical explanation to the US Model Convention, it has been explained that this provision inter alia prevents the use of fiscally transparent entities to claim treaty benefits in circumstances where the person investing through such an entity is not subject to tax on the income in its state of residence. This suggests that ordinarily without the restriction on the extent of tax treaty being applicable, a fiscally transparent entity would be eligible to be treated as a resident eligible to tax treaty claim.*
- *Your goodself will appreciate that in February 2016. the Us Treasury Department released an updated version of the US Model Convention. Amongst other changes, the phrase in the earlier versions "derived through an entity that is fiscally transparent" has been replaced by "derived by or through an entity that is treated as wholly or partially fiscally transparent."*

- *Thus, it is submitted that the intent of the Contracting States is to grant the benefits of the India-US tax treaty to a fiscally transparent entity itself to the extent the income is taxed in the US. Further, it is also submitted that the intent is to cOver an LLC which is regarded as a partnership or as a disregarded entity under this provision. Though a specific reference to LLCs is not contained in the lndia-US tax treaty, this is for the reason that the concept of a disregarded LLC did not exist at the time, the India-US tax treaty was signed.*

- *Further, it is submitted that the OECD commentary states that while interpreting terms not defined in a tax treaty for which reference is drawn to the domestic laws. An ambulatory approach is appropriate i.e., the meaning of the term prevailing under the relevant domestic legislation at the time of applying a tax treaty and not at the time when it was signed. On this basis, it is submitted that disregarded LLCs being comparable to partnerships for US federal income tax purposes should also be eligible to claim benefits of the India-US tax treaty in the same*

manner and to the same extent as applicable to partnerships, trusts and estates.

Reliance in this regard, is placed on the decision of the Mumbai Bench of the Tribunal in case of Linklaters LLP vs ITO 20101 40 SOT 51 (Mum). In this case of a UK-based limited liability partnership firm which was treated as a fiscally transparent entity in the UK, the Tribunal stated that while the modalities or mechanism of taxation may vary from jurisdiction to jurisdiction, what really matters is whether the income, in respect of which treaty protection is being sought, is taxed in the treaty partner country or not and thus held that even when a partnership firm is taxable in respect of its profits not in its own right but in the hands of the partners, as long as the entire income of the partnership firm is taxed in the residence country, treaty benefits cannot be declined. The relevant extracts of the ruling are reproduced as under:

"75. A view is thus indeed possible that, given the context in which the expression liable to taxation by reasons of his domicile, residence, place of management or any other criterion of similar nature' is employed i.e., in the context of ascertaining fiscal domicile - as evident from the title of article as Fiscal domicile", it is sufficient that under the assignment or distributive rules of the treaty, the residence State has a right to tax income of the partnership firm irrespective of the fact the position whether or not such a right is actually exercised by the residence State. The undisputed objective of article 4 is to ascertain fiscal domicile of a person, and the heading of article 4, as we have reproduced earlier in this order, is "Fiscal domicile". It is a well known Latin legal maxim that "A rubro ad nigrum" which means, literally, from red to the black. In olden times, the title of a statute as well as headings of a provision in the statute, were written in red while its body text was written in black. This Latin maxim implies that in the process of interpreting a statute, one must start from the title and interpret the text of the provision with reference to its title. The same approach must holds good for interpretation of a tax treaty as well, because that is where contextual interpretation has an even greater role to play. Viewed thus, the purpose of article 4 is ascertainment of fiscal domicile of a person, and a fiscal domicile is a factual aspect which cannot oscillate due to peripheral variations in the scheme tax laws of that jurisdiction.

*It is only elementary that no man can be without a domicile. The same is true for an enterprise, and for a fiscal domicile, as well. The test of fiscal domicile is, as adopted in the international taxation, that a person is treated as fiscally domiciled in a tax jurisdiction in which it has a locality related attachment which leads to residence type taxation. The decisive factor of every type of domicile is a locality related attachment, such as a voting right for a person which again is based on where that person ordinarily resides. To ascertain fiscal domicile in the context of taxation, this locality related attachment has to have a further attribute i.e., it should be such as to lead to a full-fledged taxation as a person resident in that tax jurisdiction is subjected to. The difficulty, however, arises when a tax jurisdiction does not exercise that right to tax - whether directly in respect of that category of persons, or even in general terms. It will be somewhat absurd to suggest that, in such situations, that ca*tegory *of persons will not have fiscal domicile anywhere. That is clearly an incongruous result. We must, therefore, apply the test of fiscal domicile in such a manner so as to lead to a reasonable result.* ***In our humble understanding, as long as de facto entire income of the enterprise or the person is subjected to tax in that tax jurisdiction, whether directly or Indirectly, the taxability test must be held to have been satisfied.*** *Of course, the other possible approach to such a situation is that as long as the tax jurisdiction has the right to tax the entire income of the person resident here, whether or not such a right is exercised, the test of fiscal domicile should be satisfied. Viewed thus, all that matters is whether that tax jurisdiction has a right to tax or not the actual levy of tax by the tax jurisdiction cannot govern whether a person has fiscal domicile in that jurisdiction or not."*

2.1 The AO was not satisfied with the same and was of the view that it is the assessee's own claim that the status of assessee is a Limited Liability Company (LLC) and a fiscal transparent entities according to US tax laws, i.e. their income is not subject to tax in their own hands in USA. Relying Article 4 of the India-USA DTAA, the AO concluded that such Corporation do not qualify as 'Residents' of USA in terms of Article 4 and only persons or entities

that are liable to tax in their country under the laws of their country are considered resident for the purpose of DTAA. AO specifically observed that in treaty context, the term “laws of that State” means taxation laws of the State. AO further observed that Limited Liability Company also do not come under the special clause of partnerships and trusts laid down in paragraph 1(b) of Article 4 of the DTAA. Accordingly, AO concluded that in case of Limited Liability Company even if the share holders are residents of USA the Treaty benefits are not available to the Corporation. Accordingly, AO proposed to assess the assessee by charging 25%.

2.2 The Assessee had moved before the DRP and filed the objections. The submissions of assessee and DRP decision thereon are reproduced for convenience as under:-

> *“3.1.1 Contesting the action of the AO, the assessee has submitted that the Assessee has obtained a tax residency certificate ("TRC") from the United States Internal Revenue Service under the Act, in accordance with section 90. Further, in accordance with section 90, the Assessee has also maintained Form 10F with the prescribed information. Given these facts, the Assessee is eligible to avail the benefits of the India-US tax treaty from the perspective of the Act. Further, in terms of the provisions of the India-US tax treaty too, the Assessee is eligible to avail its benefits since it qualifies as a resident under Article 4 of the India-US tax treaty. Under the India-US tax treaty, any assessee qualifies as a resident under Article 4, if (a) it qualifies as a 'person', and (b) it is ‘liable to tax in the resident State by reason of domicile, resident, citizenship, place of effective management, place of incorporation or any other criterion of similar nature. It is further stated that he term 'person' is defined under the India-US tax treaty to include 'an individual, an estate, a trust, a partnership, a company, any other body of persons, or other taxable entity’. Further, the term 'company' is defined under the India-US tax*

treaty to mean 'anybody corporate or any entity which is treated as a company or body corporate for tax purposes The Assessee being an LLC i.e. a limited liability company, is organised as a company under the laws of the United States. As one would note, a company is defined to include a body corporate. An LLC such as the Assessee, is organised as a body corporate since it fulfills the requirements associated with a body corporate i.e. it has a separate existence from its members, and has perpetual existence distinct from its members. Reliance in this regard is placed on the Limited Liability Act for the State of Delaware under which the Assessee was formed. Even under the Indian Corporate law, the term company includes a company incorporated outside India. The Black's law dictionary also indicates that a "body corporate' is an entity having authority under law to act as a single person distinct from the shareholders who own the entity and having rights to issue stock and exist indefinitely. In relation to the fiscal situation relating to "liable to tax', it is submitted that under the US income tax law, an LLC is given an option to either be taxed as a corporation or be taxed as a disregarded entity or partnership (depending on its number of members) wherein the income of the LLC is clubbed in the hands of its owner who merely discharges the tax that is assessable in the case of the LLC. In this context, the meaning of the phrase 'liable to tax' as is interpreted under the international commentaries and more particularly in Indian judicial precedents. It is submitted that being liable to tax' in the Contracting State does not necessarily imply that the person should actually be liable to tax in that Contracting State by virtue of an existing legal provision but would also cover cases where that other Contracting State has the right to tax such persons - irrespective of whether or not such a right is exercised by the Contracting State. Accordingly, it was submitted that the Assessee, being a US LLC, qualifies as a company' for the purpose of the India-US tax treaty. While the phrase 'liable to tax' has not been defined or explained in India-US tax treaty, as per Article 4 of the Organization for Economic Cooperation and Development ("OECD") commentary 2017, a person is considered to be liable to comprehensive taxation even if a country does not in fact impose tax. Further, your honour's attention is drawn to the commentary of Professor Philip Baker which notes that "It seems clear that a person does not have to be actually paying tax to be 'liable to tax'- otherwise a person who had deductible losses or allowances, which reduced his tax bill to zero, would find himself unable to enjoy benefits of the convention. It also seems clear that a person would otherwise be subject to comprehensive taxation but who enjoys a specific exemption from tax is nevertheless liable to tax; if the exemption were

repealed, or the person no longer qualified for the exemption, the person would be liable to comprehensive taxation." In view of this, it is submitted that "liable to tax" connotes that a person is subject to one of the taxes mentioned in Article 2 in a Contracting State and it is immaterial whether the person actually pays the tax or not. Reliance in this regard, is placed on the Supreme Court ruling in case of UOI and Anr vs. Azadi Bachao Andolan and Anr [2013] 263 ITR 706 (SC) wherein it was observed that liability to taxation is a legal situation; payment of tax is a fiscal fact. The Court had noted that for the purpose of application of Article 4 of a tax treaty, what is relevant is the legal situation, namely, liability to taxation, and not the fiscal fact of actual payment of tax. Reliance has been placed on the following decisions:

1. ADITIT) vs Green Emirates Shipping & Travels (2006] 6 SOT 329 (Mum)
2. Mohsinally Alimohammed Rafik [1995] 213 ITR 317 (Delhi)
3. ITO(IT) vs Rameshkumar Goenka (ITA No 3562 / Mum/ 2009)
4. Linklaters LLP vs ITO(IT) (2010] 40 SOT 51 (Mum)
5. DDT vs Tekmark GIobal Solutions LLC [20101 38 SOT 7 (Mum)
6. DDIT(IT) Vs M/s AP Moller (TS-555-[TAT-2013 Mum)
7.KPMG vs JCIT |2013] 33 taxmann.com 23 (Mumba)
8. Meera Bhatia vs ITO [2010) 38 SOT 95 (Mumbai)
9. ITO vs Rameshkumar Goenka (2010] 39 SOT 132 (Mum)
10. DDlT vs Mushtag Ahmad Vakil |2010) 3 taxmann.com 780 (Delhi)
11. ITO vs Mahavirchand Mehta [2011| 11 taxmann.com 194 (Mumbai)
12. ADIT vs ICICI Bank Ltd. 120121 149 T1TJ 797 (Mumbai); affirmed by the High Court of Bombay in DIT (International Taxation) vs ICICI Bank Ltd [2014] 49 taxmann.com 1 (Bombay)
13. ADIT vs Simatech Shipping Forwarding LLC |2014] 146 ITD 48 (Mumbai)
14. Prashant Kumar Gulati vs ITO [2014| 50 taxmann.com 415 (Pune)

In view of the above, it was submitted that the Assessee is eligible to claim the benefits-of India US tax treaty as it satisfies all the conditions for the eligibility at benefits of the India- US tax treaty and that the Assessee, therefore, is eligible to claim a beneficial rate of 15 percent for FIS instead of the rate provided under the Act (which is 25 percent plus applicable surcharge and cess).

3.1.2 The Panel has considered the submission. The AO has noted that the assessee' s own filings before the income tax authorities make it abundantly clear that the assessee is a "Limited Liability Company (LLC)" incorporated on 29.5.2009 in the state of Delaware in USA. Forms 15CA submitted by the remitters also mention the assessee as a LLC. He, accordingly, held that LLCs are fiscally transparent entities according to the US tax law, i.e., their income is not subject to tax in their own hands in the USA and such corporations, therefore, do not qualify as residents of USA in terms of the Article 4 of the India-USA DTAA. The AO relied in this regard on Article l of the India-US DTAA, which states that the treaty is applicable to "residents of one or both of the Contracting States Article 4 of the DTAA defines the term "resident of a Contracting State" Article 4 of the treaty further makes it clear that for the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, citizenship, place of management, place of incorporation, or any other criterion of a similar nature. He, accordingly, in view of the provisions of the treaty rightly concluded that only persons or entities that are liable to tax in their country under the laws of their country are considered resident for the purpose of the DTAA. In the treaty context, the term "laws of that State" means taxation laws of the State. It is beyond doubt and is a matter of fact that LLCs are not liable to tax in the USA. It is also undisputed that for taxation purposes, the assessee is an LLC. It may also be noted that LLCs also do not come under the special clause for partnerships and trusts laid down in paragraph 1(b) of Article 4 of the DTAA as observed by the AO in para 4.4 of his order. He, accordingly, proceeded to bring to tax the returned income of the assessee at the rate of 25%, thereby denying the treaty benefit. The Panel, therefore, finds no infirmity in the action of the AO.

3.1.3 The assessee, in this regard. has placed reliance on some case laws to argue that even a tiscally transparent entity like an LLP can be admitted to treaty benefits. However, it may be noted that the OECD has done some work on this issue and in the official commentary to the OECD Model Convention on Article 4, in para 8.4 it specifically states that where a particular country disregards a partnership for tax Purposes and treats it as fiscally transparent, taxing the partners on their share of the partnership income, the partnership itself is not 'liable to tax, and may not, therefore, be considered to be a resident of that country. This recent work of the

OECD, which goes to the root of the matter was neither pointed out nor considered in any of the decisions relied upon by the assessee. This aspect has been noted in a recent article in Daksha Baxi and Shefali Goradia, 'Characterisation of LLP for Tax and Treaty <https://www.nishithdesai.com/fileadmin/ user upload/ pdfs/Characterisation of LLP for Tax and Treaty Purposes - Indian Perspective.pdf > accessed on 22 June 2022.

3.14 Thus, the Panel is of the considered opinion that the assessee cannot be considered a resident of USA in view of the recent work of the OECD in this regard, reflecting the international law on the point. The Panel, accordingly, upholds the action of the AO and dismisses the all objections of the assessee on this count. As for the providing copy of disposal order of the assessee's objections to notice under section 148, the Panel directs the AO to provide a copy of the order to the assessee in this regard, along with the final order."

3. Arguments were heard and record has been perused.

3.1 Ld. Sr. Counsel has primarily asserted all the arguments in regard ground no. 4 to 6 only, as initially made before the AO and then submitted to DRP. Apart from that a reference was made to the relevant clauses of Publication No. 3402 of the Department of Treasury, Internal Revenue Service, USA with regard to taxation of Limited Liability Company available at pages 1-7 of PB, Regulation 301 7701-3 of the Indian Revenue Service, USA available at pages 8-17 of PB; Instructions for Form 8802 issued by Department of the Treasury, Internal Revenue Service, USA available at pages 18-33 of the PB; US tax residency rules in compliance with the OECD – Common Reporting Standard (CRS) available at pages 34-37 of the PB; Article 1 and 3 of the US Model Convention (v. 2006) available at pages 38-41 of the PB; Article 1 and 3

of US Model Convention (v. 2016) available at pages 42-47; Relevant extract of the technical explanation to the US Model Tax Convention (v. 2006) available at pages 48-53 of the PB; Relevant extract of the OECD Model Tax Convention (v.2017) dated 21.11.2017 available at pages 54-57 of the PB; Articles 3 and 4 of the India-UK treaty (amendment introduced w.e.f. 27 December 2013) available at pages 58-59 of the PB. He also referred the decision of the Tax Court of Canada in the case of TD Securities (USA) LLC vs. Her Majesty the Queen : [2010] TCC 186 available at page nos. 60-91 of the PB and the decision of the Hon'ble Supreme Court of India in the case of UOI vs. Azadi Bachao Andolan [2003] 263 ITR 706 (SC) available at pages 105 to 143 of the Paper Book and the decision of the Bombay Tribunal in the case of Linklaters LLP vs. ITO [2010] 40 SOT 51 available at page nos. 200-231 of the PB.

3.2 On the other hand, Ld. DR has submitted that there is no error in the findings of the lower tax authorities. Ld. DR also took out certain straws from the material relied upon by the Ld. Sr. Counsel and submitted that the Limited Liability Corporation can be resident of USA, if it is an association taxable as a Corporation and referring to disregarded entity, it was submitted that disregarded entity (DRE) are not considered US residents within the meaning of 'resident' under the Treaty. As far as the judgements relied were concerned, it was submitted that none of the judgment squarely applies and the judgments

are particularly in reference to the partnership firm and not corporations. It was submitted that DRP has rightly relied the OECD guidelines and there is no error in the findings of the lower tax authorities.

4. On giving thoughtful consideration to the matter on record and the submissions, it comes up that the AO has considered the status of assessee to be a Limited Liability Company. It is also considered to be a fiscal transparent entity according to US Tax laws. The treaty benefit is denied for two reasons first being a fiscally transparent entity, assessee was alleged to be not a person liable to tax in US and the conclusion drawn by the AO is that "it will beyond doubt and is a matter of fact that LLCs are not liable to tax in USA". Further, for the purpose of Paragraph 1(b) of Article 4 of India-US DTAA, the AO concluded that the LLC also do not come under the special clauses for partnerships and trusts and holding specifically that assessee is a corporation (LLC) in the eyes of US tax laws.

4.1 Thus, what is required to be ascertained is what is the status of such corporations of the nature LLC for India-US DTAA and for that purpose the Publication 3402 of the Department of the Treasury, International Revenue Service of the Government of USA on Taxation of Limited Liability Company as relied by the Sr. Counsel is a great help. The said document provides that Limited Liability Company is a business entity recognized by the United States under State law. An LLC may be classified for federal income tax purposes as a

partnership, corporation or an entity disregarded as separate from its owner. Further, it is provided that an LLC with at least two members is classified as a partnership for federal income tax purposes. An LLC with only one member is treated as an entity i.e. disregarded as separate from its owner for income tax purposes, (but as a separate entity for purposes of employment tax and certain excise taxes). Further it is provided that if an LLC has only one member and is classified as an entity disregarded as separate from its owner, its income, deductions, gains, losses and credits are reported on the owner's income tax return.

4.2. Further, as we take cognizance of the Instruction for Form 8802 which is for applying for a Residency Certification, the same provides that *"in general, under an income tax treaty, an individual or entity is a resident of United States if the individual or entity is subject to US tax by reason of residence, citizenship, place of incorporation, or other similar criteria."* Further, mentioning about who is not eligible for Form 6166, it is provided that if fiscally transparent entity organized in the United States (that is, a domestic partnership, domestic grantor trust, or domestic LLC disregarded as an entity separate from its owner) and such entity does not have any US partners, beneficiaries, or owners then such entity is not entitled for residency certification. This document/Instruction in Form 8802 also provides that the Form 6166 having residency certification is in the form of a letter of US residence certification only certify that, for the

certification year (the period for which certification is requested), the applicant were resident of US for purposes of US taxation or, in the case of a fiscally transparent entity, that the entity, when required, filed an information return and its partners/ members/ owners / beneficiaries filed income tax returns as resident of United States.

4.3 The aforesaid clauses make it very crystal clear that residency certificate as issued to the assessee and available at Page No. 14 of the Paper Book would go to show that it has been issued in terms of these instructions. We consider it appropriate to reproduce the language used in the TRC dated 30.03.2015 available at page 14 of the paper book which is as follows:-

> *"I certify that, to the best of our knowledge, the above-named Limited Liability Company is a branch, division, or business unit of a U.S. corporation that is a resident of the United States of America for purposes of U.S. taxation."*

4.4 The aforesaid discussion further establishes that under US federal income tax law, an LLC with a single owner is disregarded as separate from its owner unless the LLC elects to be treated as a corporation for US federal income tax purposes. The ability of the LLC to elect its tax classification under US federal income tax law also supports the legal situation or aspect of the LLC being liable to tax. Further, where a LLC is disregarded as separate from its tax owner for US federal income tax purposes, the tax owner of the LLC pays tax on the

tax owner's share of the taxable income attributed from the LLC. This further supports the legal situation of a LLC being liable to tax, i.e., the LLC is essentially 'liable to tax' but the income is attributed to its tax owner and such tax is imposed and paid by its respective tax owner, like US consolidated group rules where all affiliated US corporations file a single US federal income tax return.

4.5 After taking into consideration the aforesaid discussion, we are of the considered view that the Tax Residency Certificate as received from the United States Internal Revenue Service in accordance with the requirement of the law as applicable to the assessee, being an LLC, which is organized as body corporate as it fulfills all the requirements of a body corporate in the form of legal recognition of a separate existence of the entity from its Member and a perpetual existence distinct from its Members. Thus, the assessee being a resident under Article 4 of the Indo-US Tax Treaty by virtue of incorporation and its recognition as a separate existence from its Members qualifies as a 'person'.

4.6 Further, the assessee is liable to tax in the resident State by virtue of US Income-tax Law as an LLC is given an option to either be taxed as a corporation or be taxed as a disregarded entity or partnership (depending on number of

members) wherein the income of the LLC is clubbed in the hands of its owner who merely discharges the tax that is assessable in the case of the LLC.

4.7 The ld. tax authorities below have fallen at both the counts by though considering the assessee to be a fiscally transparent entity has not considered to be not qualifying to be a person under Article 4 and, at the same time, have failed to appreciate that the phrase ‘liable to tax’ has to be interpreted in the way that the assessee is liable to tax under the authority of the US Income-tax law. We are of the considered view that the intent of the Indo-US Treaty has to be given precedence wherein the concept of fiscally transparent entity is the recognized way of recognizing the phrase ‘liable to tax.’ The fact that paragraph 1(b) of Article 4 of the Indo-US Tax Treaty recognizes partnership as a resident of the US for the purpose Indo-US Treaty to the extent that the income derived by such partnership is subject to tax in the US as the income either in the hands of the partnership or in the hands of its partners or beneficiaries. In this context, the judgement of the Mumbai Tribunal in the case of **Linklaters LLP vs. ITO (supra)** can be relied.

4.8 Further, we also find force in the contention of the ld. Sr. Counsel that this provision imposes a limitation on eligibility of a partnership to avail the benefits of India-US tax treaty as prescribed, i.e., it seeks to exclude from the eligibility of provisions of India-US tax treaty such income of the partnership which is not 'subject to tax' in the US (either in the hands of partnership or

partners). Reliance in this regard can be placed on ruling by AAR in case of ***General Electric Pension Trust vs DIT [2006] 150 Taxman 545 (AAR).*** In this consideration of the matter, it can be concluded that that an exclusion provision can only exclude something if it was included at the outset. Hence, a fiscally transparent partnership was already regarded as 'liable to tax' for the purposes of India-US tax treaty and this provision determines the scope of eligibility of such fiscally transparent partnership by excluding income which is not ultimately 'subject to tax' in the US.

5. In the light of the aforesaid, we are of the considered view that tax authorities have fallen in error in not extending the treaty benefit to the assessee. As a sequel to above discussion, ground no. 1 to 3 are disposed of as not pressed. The grounds no. 4 to 6, as were only argued are sustained and ground no. 7 and 8 are left academic so do not require any determination. **Resultantly the appeal of the assessee is allowed.**

Order pronounced in the open court on 05.09.2024.

Sd/-	Sd/-
(DR. B.R.R. KUMAR) ACCOUNTANT MEMBER	(ANUBHAV SHARMA) JUDICIAL MEMBER

Dated: 05th September, 2024.

dk

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi