

**IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'D' NEW DELHI**

**BEFORE SHRI SAKTIJIT DEY, VICE-PRESIDENT
AND
DR. B.R.R KUMAR, ACCOUNTANT MEMBER**

ITA No.2395/Del/2022
Assessment Year: 2017-18

Operadora Commercial De Desarrollo S.A. DE C.V. Mexico, C/o- Bhatia & Bhatia, Chartered Accountants, First Floor, 81, Hemkunt Colony, New Delhi	Vs.	DCIT, International Taxation, Circle-2(2)(2), New Delhi
PAN :AABCO9252E		
(Appellant)		(Respondent)

Assessee by	Sh. Anant Bhatia, CA Ms. Palak Agnihotri, CA
Department by	Sh. Vizay B. Vasanta, CIT(DR)

Date of hearing	21.09.2023
Date of pronouncement	21.09.2023

ORDER

Captioned appeal has been filed by the assessee challenging the final assessment order dated 06.06.2022 passed under section 143(3) read with section 144C(13) of Income-tax Act, 1961 (in short 'the Act'), pertaining to assessment year 2017-18, in pursuance to directions of learned Dispute Resolution Panel (DRP).

2. Registry has pointed out delay of 52 days in filing the present appeal. The assessee has furnished letter dated 27th September, 2022 seeking condonation of delay.

3. Having heard the parties, we are satisfied that the delay in filing the appeal was due to reasonable cause. Accordingly, we condone the delay and admit the appeal for adjudication on merits.

4. The dispute in the present appeal is confined to addition of an amount of Rs.5,44,19,669/- as short term capital gains under the provisions of section 50 of the Act.

5. Briefly the facts are, the assessee is a non-resident corporate entity incorporated in Mexico and a tax resident of Mexico. For the assessment year under dispute, the assessee had received two streams of income from India. Firstly, the assessee had receipts from provision of back office support services. In the return of income filed for the impugned assessment year, the assessee offered such receipts to tax as Fees for Technical Services ('FTS'). In addition to such receipt, the assessee had received an amount of Rs.5,42,90,669/- from sale of tangible assets. However, this amount was not offered to tax pleading that such receipts do not fall under any of the head of income provided in the India -

Mexico Double Taxation Avoidance Agreement (DTAA), except Article 7 which deals with business profit. It was submitted by the assessee that since the assessee does not have a Permanent Establishment ('PE') in India, the receipts are not taxable.

6. The Assessing Officer, however, did not accept the contention of the assessee. He held that since the tangible assets sold by the assessee are depreciable, on which the assessee has claimed depreciation, the gain arising from sale of such assets has to be treated as short term capital gain under section 50 of the Act. Accordingly, he proceeded to tax the amount of Rs.5,42,90,669/- while framing the draft assessment order. Against the draft assessment order, the assessee raised objections before learned DRP. However, learned DRP upheld the addition made by the Assessing Officer. Accordingly, assessment was finalized.

7. Before us, learned counsel appearing for the assessee submitted that the assessee is a Mexican resident holding valid Tax Residency Certificate ("TRC"), hence, entitled to avail benefits under India – Mexico DTAA. He submitted, as per the provisions contained under Article 13(6) of the Act, the receipts from sale of tangible assets is not taxable in India. He submitted, the assessee

has taken the aforesaid contention, both before the Assessing Officer and learned DRP, however, no decision on the issue has been taken by both of them. Thus, he submitted, the receipts, being clearly exempt from tax in India, in terms of Article 13(6) of India – Mexico DTAA, the addition made should be deleted.

8. Learned Departmental Representative submitted, assessee's claim of benefit under India – Mexico DTAA has not, at all, been considered either by the Assessing Officer or by learned DRP. Hence, the issue may be restored back to the Assessing Officer.

9. We have considered rival submissions and perused the materials on record. Undisputedly, the assessee is a Mexican resident holding a valid TRC. Therefore, as per section 90(2) of the Act, the provisions of the domestic law would apply to the assessee in case they are more beneficial. However, in the facts of the present appeal, the treaty provisions being more beneficial, the assessee has claimed benefit therein, which in our view, is acceptable. Though, the assessee has made submissions both before the Assessing Officer and learned DRP claiming treaty benefit, however, the contentions of the assessee has been glossed over by the departmental authorities and no conclusive finding has been recorded by them. This, in our view, is unacceptable.

10. A reading of Article 13 of India – Mexico DTAA reveals that tangible assets sold by the assessee can only get covered under paragraph 2 of Article 13, however, the condition precedent for applying paragraph 2 of Article 13 is existence of a fixed place of business or Permanent Establishment (“PE”) in India. In the facts of the present appeal, the assessee has asserted that it has not PE in India. Even, the departmental authorities have not disputed the aforesaid claim of the assessee.

11. Paragraph 6 of Article 13, which is a residuary clause, provides that the gains from alienation of any property other than those referred to in paragraphs 1 to 5 shall be taxable only in the country of residence of the alienator. Meaning thereby, if the gain arises from alienation of any property, which is not covered in the preceding paragraphs, it can only be taxed in the country of residence of the assessee, i.e., Mexico. In the facts of the present appeal, admittedly, the gain from sale of tangible assets does not fall under Article 13(1) to 13(5) of India – Mexico DTAA. Therefore, the only provision, which covers the gain, is Article 13(6). As per the provision contained therein the gain derived can only be taxed in Mexico. That being the legal mandate, the capital gain derived from sale of tangible assets is not taxable in India. Accordingly,

we direct the Assessing Officer to delete the addition. Since, the assessee is eligible to avail treaty benefit, the issue whether the gain is taxable under the domestic law or not has become academic, hence, does not require consideration.

12. In the result, the appeal is allowed.

Order pronounced in the open court on 21st September, 2023

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

Sd/-
(SAKTIJIT DEY)
VICE-PRESIDENT

Dated: 21st September, 2023.

RK/-

Copy forwarded to:

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

Asst. Registrar, ITAT, New Delhi