

\$~8

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

%

Date of Decision: 31.07.2019

+

EX.P. 334/2014

XSTRATA COAL MARKETING 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 BHARAT (CEMENT) LTD 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 two foreign awards dated 30.01.2014 and 30.04.2014. The first award i.e. the award dated 30.01.2014 relates to the merits of the matter while the second award is limited to costs.

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 07.11.2016.

3. The judgment debtor had carried the matter in appeal right up to the Supreme Court. The Supreme Court, vide order dated 27.02.2017 passed in Special Leave Petition (Civil) No.6369/2017 (SLP), dismissed the SLP. Consequently, the judgment of this court dated 07.11.2016 stands sustained.

4. The record also shows that pursuant to the orders passed by this court, the judgment debtor deposited a cumulative sum of Rs. 4.50 crores, a part of which was released vide order dated 17.12.2018. The decree holder, presently, seeks release of the balance amount along with accrued interest. The reason that a certain portion of the amount was kept back was 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 dated 05.03.2018 filed by Dr. Prabha Kant, Commissioner of Income Tax (International Taxation) – 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 also 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 "Xstrata" and "Dalmia"	INR 2,67,07,129.6	This is income of Decree Holder from a source in India. In absence of a Permanent Establishment in India, this cannot be taxed as business income under the provisions of DTAA. Therefore, the nature of this income is " <i>income from other sources</i> ". Under the Act, such income is taxable at the rate of 40% plus surcharge and

		<p>education cess i.e. 42.024%.</p> <p>However, pursuant to Article 22 of the DTAA, “<i>Other income</i>” 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 Article 22(3) of the DTAA, income which is in the nature of windfall gains are taxed in the contracting state in which such income has arisen. A windfall gain is income received due to an unforeseen event over which the recipient had no control. The income from the award, prima facie, 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 pursuant to a detailed assessment under the Act.</p> <p>At this stage therefore, it would be fair to deduct tax at the rate of 42.024% on the award income under the provisions of the Act.</p>
Cost of Arbitration proceedings	INR 53,47,775.5	<p>This portion of the award is in lieu of expenses incurred by Decree Holder on a number of items which mainly include costs incurred on engaging professional experts like lawyers etc. for the purposes of arbitration. Therefore, Decree Holder has incurred these expenses for availing services which are prima-facie technical/consultancy services which</p>
Legal Costs	INR 1,22,22,029.97	

		<p>are taxable as “<i>Fee for Technical services</i>” under the provisions of Act as well as the DTAA.</p> <p>The payment by Judgment Debtor to Decree Holder appears to be a reimbursement however the money is to flow from Judgment Debtor to Decree Holder and from Decree Holder to legal/technical experts, this means that the source of “<i>fee for technical services</i>” is in India. Under the Act such services are taxable @ 40% + surcharge and education cess i.e. 42.024%. However, under the beneficial provisions of DTAA, Fee for Technical Services is taxable at the rate of 10%</p> <p>Considering the facts of the case and subject to a detailed assessment in terms of the Act, after prima facie providing the benefit of DTAA to the decree holder, tax may be deducted on this amount @ 10%.</p>
Interest on the above	Not yet known	<p>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%.</p> <p>Considering the facts of the case and subject to a detailed assessment in terms of the Act, after prima facie providing the benefit of DTAA to the decree holder, tax may be deducted on this amount @ 10%.</p>

Total	INR 4,42,76,935.07 + interest	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. To be noted, insofar as the last limb is concerned, which is interest, no figure has been mentioned by Dr. Prabha Kant.

8. Be that as it may, 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.

9. 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.”

10. 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.

11. 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.

12. 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.

13. 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.

14. 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.

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

15.1 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.

16. 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.

17. 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.

17.1 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.

18. 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.

19. 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.

20. The captioned petition is disposed of in the aforesaid terms.

JULY 31, 2019

aj

RAJIV SHAKDHER, J