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NATIONAL MOOT COURT (VIRTUAL) COMPETITION, & RESEARCH PAPER COMPETITION 2022

Maharashtra National Law University-Mumbai
in association with

All India Federation of Tax Practitioners (Western Zone),
Income-tax Appellate Tribunal Bar Association - Mumbai

&

Goods Services Tax Practitioners' Association -
Maharashtra



MOOT PROPOSITION

1. A US company ('U' Co) is the world's largest FMGC company, selling products, food and other household items. 'U' Co is also the holding company for various subsidiaries and entities around the globe.
2. In 2010, 'U' Co incorporated a subsidiary in the Netherlands ('N' Co). Immediately on incorporation, 'N' Co acquired shares in an Indian company ('I' Co) that manufactures FMGC goods and undertakes distribution of the products in India.
3. In 2015, the group underwent a restructuring and 'U' Co decided to form a company in Singapore ('S' Co). The restructuring was necessitated due to 'U' Co selling shares of another entity not connected with India. 'N' Co merged with 'S' Co. The merger was a tax-exempt transaction in Netherlands and Singapore.
4. In 2016, 'I' Co declared and paid dividends to 'S' Co.
5. In 2020, 'S' Co sold shares in 'I' Co to a third-party French entity ('F' Co). For the purchase of shares from 'S' Co, 'F' Co had conducted some negotiations/discussions with 'U' Co. Further, 'F' Co had deposited the amount in a US Bank Account held by 'S' Co.
6. 'S' Co is a resident of Singapore under Article 4 of the India - Singapore Double Tax Avoidance Agreement (DTAA). 'S' Co holds a valid Tax 1. 'S' Co is a resident of Singapore under Article 4 of the India - Singapore Double Tax Avoidance Agreement (DTAA). 'S' Co holds a valid Tax Residency Certificate (TRC) issued by the Singapore tax authorities. 'S' Co filed a return of income in India and claimed eligibility under DTAA. Further, it claimed exemption under Article 13(4A) of the DTAA, as the shares in "I" Co were acquired by it before 1st April 2017 and were grandfathered. During the year of the sale, 'S' Co incurred substantial expenditure in Singapore (more than Singapore Dollars 3,00,000). Hence, it claimed that the capital gains on the sale of shares in 'I' Co could not be taxed in India as it complied with the Limitation of Benefit Clause ('LOB' Clause) under Article 3 of the protocol to the DTAA.

THE ORDER PASSED BY THE ASSESSING OFFICER (AO)

1. General Anti-Avoidance Rules (GAAR) provisions were introduced in the Income-tax Act, 1961 (the Act) by Finance Act, 2012 but their implementation was postponed until Assessment Year 2018-19. After taking all the requisite approvals and affording an opportunity to hear 'S' Co, the AO passed an order invoking GAAR.
2. The AO held that 'S' Co was not eligible to claim benefits of the DTAA. In the garb of restructuring, 'U' Co had formed 'S' Co with no business or commercial purpose. The restructuring had nothing to do with India. The merger was a tax-exempt transaction in Netherlands and Singapore
3. The AO held that the transaction was an 'impermissible avoidance arrangement' defined under section 96 of the Act and 'lacked commercial substance' as defined in section 97(1)(c) of the Act. The main purpose of the formation of 'S' Co was to obtain a tax benefit under the DTAA.
4. The AO did not verify the dividend declared and paid to 'S' Co. He held that a valid TRC was not sufficient to claim the benefit of the DTAA as in his view section 92(2A) of the Act would override sections 90(4) and 90(5) of the Act. Hence, the application of GAAR would override the treaty. Even compliance with the LOB clause is not sufficient.
5. Aggrieved by the decision, 'S' Co challenged the order before the Hon'ble High Court at Bombay by way of a writ petition, which was numbered WP No. 1058 of 2022. 'S' Co also questioned the constitutional validity of GAAR provisions in the petition.

ISSUES

1. Whether GAAR provisions contained in Chapter X-A of the Act are constitutionally valid?
2. Whether the specific anti-avoidance provisions contained in the DTAA will override the GAAR provisions in the Act or vice versa?
3. Any other issue with the permission of the Court.