Income attributable to the taxpayer’s foreign branches having a PE outside India is not taxable in India

**Background**

The Bombay High Court in the case of Bank of India\(^1\) (the taxpayer) held that income attributable to the taxpayer’s foreign branches having a Permanent Establishment (PE) outside India is not taxable in India. If the taxpayer has a PE abroad, then, the taxpayer would be required to produce evidence regarding payment of taxes pertaining to the income of these establishments abroad. On production of such evidence, the taxpayer would be entitled to the tax treaty benefit.

**Tribunal’s ruling\(^2\)**

- The taxpayer had sought relief in respect of the profit earned by the foreign branches on the basis of respective tax treaties. The Assessing Officer (AO) granted a benefit in respect of the branches at Singapore and Japan but denied the benefit to the taxpayer in respect of the other branches. The Commissioner of Income-tax (Appeals) [CIT(A)] allowed the taxpayer’s claim.

- The Mumbai Bench of the Income-tax Appellate Tribunal (the Tribunal) dealt with a question of whether income earned from foreign branches would be taxable in India. The Tribunal held that in the case of all the foreign countries, the operations were carried out through its branches which is a PE situated outside India. Therefore, the income attributable to these branches cannot be taxed in India. The Tribunal followed its earlier ruling where on perusal of Articles 23, 24 and 25 of the relevant tax treaties, it was held that the laws in force in either of the contracting states would govern the taxation of income in the respective contracting states i.e. credit of tax paid in one state would be given in the other state.

**Taxpayer’s contention**

- The PE or branches outside India generated income, which was subjected to the income-tax laws prevailing abroad. Once the factual position is not disputed by the tax department, then, the benefit of the tax treaty has been rightly extended.

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\(^1\) CIT v. Bank of India [2015] 64 taxmann.com 215 (Bom)

\(^2\) Bank of India v. DCIT [2012] 27 taxmann.com 335 (Mum)
Tax department's contentions

- The Tribunal committed an error in holding that the operations of the branches in foreign countries constitute a PE outside India and therefore, the income attributable to the said branches cannot be taxed in India.

- This finding is rendered without advert to the relevant factual material and proof of payment of taxes in relation to the establishment abroad.

Bombay High Court’s ruling

- The AO was satisfied that the benefit of the tax treaty is admissible, provided the proof is produced in relation to the payment of taxes by the taxpayer abroad. If the taxpayer has a PE abroad, then, the taxpayer would have to produce evidence regarding payment of taxes pertaining to the income of these establishments abroad. On production of such evidence, the taxpayer would then be entitled to the benefit. The evidence was always available as noted by the CIT(A) and the Tribunal.

- The tax authorities followed their earlier orders based on identical facts and circumstances. Therefore, it cannot be termed as perverse or vitiated by any error of law apparent on the record.

Our comments

In the instant case, the Bombay High Court observed from the order of the Tribunal that in all the foreign countries the operations were carried out through the taxpayer's branches which created PE outside India. Therefore, the income attributable to these branches cannot be taxed in India.

It was also observed that the AO was satisfied that the benefit of the tax treaty is admissible, provided proof is produced in relation to the payment of taxes by the taxpayer abroad. On production of such evidence, the taxpayer would be entitled to the tax treaty benefit.