IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'D' BENCH, NEW DELHI [THROUGH VIDEO CONFERENCE]

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND SHRI AMIT SHUKLA, JUDICIAL MEMBER

ITA No. 468/DEL/2021
[Assessment Year: 2004-05]

Canon India Pvt Ltd 7th Floor, Building No. 5 Tower B, DLF Cyber City DLF Phase – III, Gurgaon Haryana	Vs.	The A.C.I.T National Faceless Assessment Centre, New Delhi
PAN : AAACC 4175 D		
[Appellant]		[Respondent]

Date of Hearing : 11.10.2021
Date of Pronouncement : 20.10.2021

Assessee by : Shri Himanshu Sinha, Adv
Shri Bhuwan Dhoopar, Adv

Revenue by : Shri Gangadhar Panda, CIT-DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

This appeal by the assessee is preferred against the order dated 30.03.2021 framed u/s 143(3) r.w.s 254 of the Income tax Act, 1961 [hereinafter referred to as 'The Act' for short].

2. Modified grounds of appeal of the assessee read as under:

"1. That on the facts and circumstances of the case and in law, the Ld. AO has erred in not allowing complete credit of taxes paid by appellant in Japan on income from sale of software amounting to INR 3,96,12,848 under Article 23 of India-Japan Double Taxation Avoidance Agreement.

1.1 That on the facts and circumstances of the case and in law, the Ld. AO has erred in not allowing complete credit of foreign taxes paid by appellant in Japan, by completely disregarding the decision of Karnataka High Court in the case of Wipro vs DCIT [2015] 62 taxmann.com 26 (Karnataka) and other judicial precedents placed by the appellant on record on the ground that decision of the Karnataka High Court in the case of Wipro vs DCIT is in appeal before the Hon'ble Supreme Court.

2. That on the facts and circumstances of the case and in law, the Ld. AO has erred in withdrawing credit of taxes paid by appellant in Japan on export revenues from sale of software duly allowed in the original assessment order passed under section 143(3) of the Act dated 22 December 2006 without making any adverse inference on the same.

3. That on the facts and circumstances of the case and in law, the Ld. AO has erred in considering incorrect MAT tax rate @ 8.25% instead of the statutory rate of 7.69% provided under section 115JB of the Act.

4.That on the facts and in the circumstances of the cafe and in law, the Ld. AO has erred not granting interest under section 244A(a) of the Act from the first date of the assessment year and under section 244A(b) of the Act from the first date of paymentof tax, on the income-tax refund due, including refund arising on account of foreign tax credit

3. Representatives of both the sides were heard at length. Case records carefully perused and judicial decisions relied upon by the counsel duly considered.

4. Briefly stated, the facts of the case are that the assessee filed its original return of income dated 30.10.2004 wherein deduction u/s 10A of the Income tax Act, 1961 [hereinafter referred to as 'The Act' for short] was claimed against income earned by STP Unit amounting to Rs. 3,17,99,733/-.

5. During the year under consideration, the assessee had rendered software related services to its AE Canon Inc. Japan. Income from these software services in Japan was subjected to tax in Japan @ 20% pursuant to Article 12 of India-Japan Treaty. Total tax deducted at source in Japan was Rs. 3,96,12,848/-.

6. The assessee had claimed foreign tax credit of Rs. 5,43,360/- despite total taxes deducted at source in Japan amounting to Rs. 3,96,12,848/-. Limited claim was restricted to actual income tax liability which was substantially low as the assessee was eligible for exemption u/s 10A of the Act and had significant brought forward losses.

7. During the first round of assessment, the Assessing Officer allowed claim of foreign tax credit to the extent of Rs. 13,67,134/- as against 5,43,360/- claimed in the return of income on account of increase in assessee's income tax liability since the same was determined under MAT provisions by the Assessing Officer. In addition to that, there were certain TP adjustments and corporate additions which were challenged before the ld. CIT(A) and thereafter, before the ITAT. The Tribunal remanded the matter back to the TPO for fresh adjudication.

8. In the remand proceedings, the assessee filed additional objections before the DRP claiming the entire amount of Rs. 3,96,12,848/- withheld by Canon Inc. Japan as tax credit. This claim was made in view of the Hon'ble Kerala High Court decision in the case

of Wipro Ltd 382 ITR 179. However, the DRP did not adjudicate upon this additional addition.

9. Subsequent to DRP's directions, the Assessing Officer passed final assessment order which was rectified on 22.07.2021, which is under appeal. In the impugned order, the Assessing Officer has noted that the only reason for not allowing foreign tax credit is pendency of the issue before the Hon'ble Supreme Court. Further, the Assessing Officer calculated MAT liability by taking MAT @ 9.75% instead of 7.69% as provided u/s115JB of the Act.

10. It would not be out of place to point out that during the original assessment proceedings, there was no error in calculation of net liability. It is only in the remand proceedings, and in particular, the rectification order that the Assessing Officer calculated the MAT liability incorrectly.

11. In so far as the claim of 100% credit tax paid in Japan is concerned, this issue was considered by this Tribunal in the case of HCL Comet in ITA No. 5555/DEL/2014, 6162/DEL/2013 and

835/DEL/2014. The relevant findings of the coordinate bench read as under:

> "48. Facts on record show that during the year under consideration, the assessee has PE in USA and accordingly paid tax in USA on the income arising therefrom. The income which was subjected to tax in USA was included in the total income computed for payment of tax in India. However, in respect of the said income earned from USA, the assessee claimed deduction u/s 10A of the Act in the return of income filed in India and did not claim credit of foreign taxes.
>
> 49. Subsequently, the Hon'ble High Court of Karnataka in the case of Wipro Ltd [supra] clarified the law in relation to the claim of foreign tax credit. The Hon'ble High Court, while interpreting the provisions of section 90(1)(a)(ii) of the Act, providing for relief from double taxation where income of the assessee is chargeable under the Act as well as in the corresponding law in force in foreign country has held that income u/s 10A of the Act is chargeable to tax u/s 4 of the Act and is includible in the total income u/s 5 of the Act, but no tax is charged on such income because of exemptions given u/s 10A of the Act only for a period of 10 years.
>
> 50. The Hon'ble Karnataka High Court was seized inter alia, with the following substantial question of law:
>
> "Whether the Tribunal was right in holding that the credit for Income tax paid in a country outside India in relation to income

eligible for deduction u/s 10A of the Act would not be available u/s 90(1)(a) of the ACT."

51. The Hon'ble High Court observed as under:

"26. The answer to the question depends on the interpretation to be placed on Section 90 which is found in Chapter IX which deals with Double Taxation Relief.

27. Section 90 deals with agreement with foreign countries or specified territories. The present Section came into force from 01.04.2004. Earlier to that period, Section 90 read as under:

"90. Agreement with foreign countries.--(1) The Central Government may enter into an agreement with the Government of any country outside India--

(a) for the granting of relief in respect of income on which have been paid both income-tax under this Act and income-tax in that country; or..."

28. The notes on clauses to Finance Bill, 2003 which explains Clause 43 seeking amendment to the Act reads as follows:

"Clause 43 seeks to amend section 90 of the Income-tax Act relating to agreement with foreign countries.

The existing provisions of the said section, inter alia, provide that the Central Government may enter into agreement with the Government of any country outside India for granting of relief in respect of income on which have been paid both income-tax under the Income Tax Act and income-tax in that country, or for the avoidance of double taxation of income under that Act and under the corresponding law in force in that country, etc. It is proposed to substitute clause (a) of sub-section (1) of the said section to provide that the Central Government may enter into an agreement with the Government of any country outside India for the granting of relief, inter alia, in respect of income-tax chargeable under the Income-tax Act or under the corresponding law in force in that country to promote mutual economic relations, trade and investment."

29. The memorandum explaining provisions in the Finance Bill 2003 reads as follows:

"Double Taxation Avoidance Agreements- extending the scope to include agreements for developing mutual trade and investment Under the existing section 90, the Central Government may enter into an agreement with the Government of any country outside India for granting of relief in respect of income on which have been paid both income-tax under the Income-tax Act and income-tax in that country, or for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country, etc. In order to encourage international trade and commerce, it is proposed to insert a new clause in sub-section (1) of Section 90 so as to provide that the Central Government may also enter into an agreement with the Government of any country outside India, for granting relief in respect of income-tax chargeable under this Act or under the corresponding law in that country to promote mutual economic relations, trade and investment."

The amended Section 90 reads as under :--

"Agreement with foreign countries or specified territories.

90 (1) The Central Government may enter into an agreement with the Government of any country outside India or specified territory outside India, --

(a) for the granting of relief in respect of --

(i) income on which have been paid both income tax under this Act and income-tax in that country or specified territory, as the case may be, or

(ii) income-tax chargeable under this Act and under the corresponding law in force in that country or specified territory, as the case may be, to promote mutual economic relations, trade and investment, or

(b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country or specified territory, as the case may be, or

(c) for exchange of information for the prevention of evasion or avoidance of income-tax chargeable under this Act or under the corresponding law in force in that country or specified territory, as the case may be, or investigation of cases of such evasion or avoidance, or

(d) for recovery of income-tax under this Act and under the corresponding law in force in that country or specified territory, as the case may be, and may, by notification in the Official Gaxette, make such provisions as may be necessary for implementing the agreement.

(2) Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee.

(2A) Notwithstanding anything contained in sub- section (2), the provisions of Chapter X-A of the Act shall apply to the assessee even if such provisions are not beneficial to him.

(3) Any term used but not defined in this Act or in the agreement referred to in sub-section (1) shall, unless the context otherwise requires, and is not inconsistent with the provisions of this Act or the agreement, have the same meaning as assigned to it in the notification issued by the Central Government in the Official Gazette in this behalf."

30. Sub-section (1) lays down that the Central Government may enter into an agreement with the Government of another country. Clause (a) (i) contemplates situation when tax is already paid on the same income in both the countries and it empowers the Central Government to grant relief in respect of such double taxation. Clause (b) which is wider than clause (a) provides that any agreement may be made for the avoidance of the double taxation of income under the Act and under the corresponding law in force in that country. Clauses (c) and (d) essentially deals with the agreements made for the exchange of information, investigation of

cases and recovery of income tax. With effect from 1.4.2004, clause (a)(ii) was substituted to provide for entering into an agreement for granting relief in respect of income tax chargeable under this Act and under corresponding law in force in that country, to promote mutual economic relations, trade and investment. With this amendment the power of the Central Government has been greatly widened and it can now enter into agreement not only for avoidance of double taxation, but also for granting relief for income exempt from taxation.

31. Thus, Section 90 empowers the Central Government to enter into an agreement with the Government of any country for two purposes:

(a) for granting of relief in respect of income tax paid or payable

(b) for avoidance of double taxation of income

32. Prior to the amendment, the relief was granted in respect of income on which the income tax is paid under the Income Tax Act in the contracting country. Therefore to get the benefit of the said provision, payment of income tax in both the countries was sine qua non. However, by the amendment made by the Finance Act 2003, the benefit of granting the relief was extended to even in respect of income tax chargeable under the Act. Therefore, the payment of income tax in both jurisdictions is not sine qua non any more for granting the relief. This provision was introduced with the object of promoting mutual economic relations, trade and investment. In other words, it was a policy of the Government.

33. When there is a specific provision in the double taxation avoidance agreement providing for a particular mode of computation of income or granting of relief, the same should be followed irrespective of the provisions of the Act. If the agreement with the foreign country is under Clause (a)(i) for relief against double taxation and not under Clause (b) for the avoidance of double taxation; the assessee must show that the identical income has been doubly taxed and that he has paid tax both in India and in the foreign country on the same income. Section 91 makes it clear that if a person who is residing in India has paid tax in any country with which, there is no agreement under Section 90 for the relief or avoidance of double taxation, income tax if

deducted or otherwise paid as per law in force in that Country, then he shall be entitled to the deduction from the Indian Income Tax payable by him in a sum computed on such doubly taxed income, at the Indian rate of tax or the rate of tax of the said country, whichever is lower or the Indian rate of tax, if both the rates are equal.

34. In fact, the Circular No.333 dated April 2, 1982 clarifies the legal position. The said circular reads as under:--

"The correct legal position is that where a specific provision is made in the Double Taxation Avoidance Agreement, that provision will prevail over the general provisions contained in the Income Tax Act, 1961. In fact the Double Taxation Avoidance Agreements which have been entered into by the Central Government under Section 90 of the Income Tax Act, 1961, also provide that the laws in force in either country will continue to govern the assessment and taxation of income in the respective country except where provisions to the contrary have been made in the agreement. Thus where a Double Taxation Avoidance Agreement provided for a particular mode of computation of income, the same should be followed, irrespective of the provisions in the Income Tax Act. Where there is no specific provision in the agreement, it is the basic law i.e., Income tax Act that will govern the taxation of income."

35. It is necessary to notice that if no tax liability is imposed under this Act, the question of resorting to the agreement would not arise. No provision of the agreement can possibly fasten a tax liability where the liability is not imposed by the Act.

36. The Apex Court had an occasion to go into the validity of the agreements entered into under these provisions and their enforceability in the case of Union of India v. Azadi Bachao Andolan [2003] 263 ITR 706/132 Taxman 373 (SC). Dealing with the purpose of provisions for avoidance of double taxation, the Supreme Court at page 721 held as under :--

"Every country seeks to tax the income generated within its territory on the basis of one or more connecting factors such as location of the source, residence of the taxable entity, maintenance of a permanent establishment, and so on. A country

might choose to emphasise one or the other of the aforesaid factors for exercising fiscal jurisdiction to tax the entity. Depending on which of the factors is considered to be the connecting factor in different countries, the same income of the same entity might become liable to taxation in different countries. This would give rise to harsh consequences and impair economic development. In order to avoid such an anomalous and incongruous situation, the Governments of different countries enter into bilateral treaties, Conventions or agreements for granting relief against double taxation. Such treaties, conventions or agreements are called double taxation avoidance treaties, conventions or agreements.

The power of entering into a treaty is an inherent part of sovereign power of the State. By Article 73, subject to the provisions of the Constitution, the executive power of the Union extends to the matters with respect to which the Parliament has power to make laws. Our Constitution makes no provision making legislation a condition for the entry into an international treaty in time either of war or peace. The executive power of the Union is vested in the President and is exercisable in accordance with the Constitution. The Executive is qua the State competent to represent the State in all matters international and may by agreement, convention or treaty incur obligations which in international law are binding upon the State. But the obligations arising under the agreement or treaties are not by their own force binding upon Indian nationals. The power to legislate in respect of treaties lies with the Parliament under entries 10 and 14 of List I of the Seventh Schedule. But making of law under that authority is necessary when the treaty or agreement operates to restrict the rights of the citizens or others or modifies the law of the State. If the rights of the citizens or others which are justiciable are not affected, no legislative measure is needed to give effect to the agreement or treaty.

When it comes to fiscal treaties dealing with double taxation avoidance, different countries have varying procedures. In the United States such a treaty becomes a part of municipal law upon ratification by the Senate. In the United Kingdom such a treaty would have to be endorsed by an order made by the Queen in Council. Since in India such a treaty would have to be translated into an Act of Parliament, a procedure which would be time

consuming and cumbersome, a special procedure was evolved by enacting section 90 of the Act."

37. It is in this background, when we notice Section 90 of the Act - relief from double taxation is granted in the following circumstances.

Firstly, Section 90 (1)(b) of the Act speaks about avoidance of double taxation i.e., Central Government may enter into an agreement with the Government of any country for the avoidance of double taxation of income under this Act and under the corresponding law in force in other country i.e., when tax is payable on income under this Act as well as under the corresponding law in that country they could agree to tax in one country. This happens even before payment of any tax. By virtue of such agreement, tax is paid only in one country, that is how the benefit of double taxation relief by way of avoidance is granted to the assessee in both the countries.

38. Secondly, under Section 90 (1)(a)(i) of the Act, once such assessee has paid Income Tax, under the Act as well as the Tax in the other country, by such agreement, relief could be given by giving credit of the tax paid in the foreign country to the assessee in India. In cases covered under this provision the assessee pays tax in both the jurisdictions. After payment of such tax, he is entitled to double taxation relief by way of credit in respect of the tax paid in the foreign jurisdiction.

39. Thirdly, in cases covered under Section 90 (1)(a)(ii) of the Act it is not a case of the income being subjected to tax or the assessee has paid tax on the income. This applies to a case where the income of the assessee is chargeable under this Act as well as in the corresponding law in force in the other country. Though the income tax is chargeable under the Act, it is open to the Parliament to grant exemptions under the Act from payment of tax for any specified period. Normally it is done as an incentive to the assessee to carry on manufacturing activities or in providing the services. Though the Central Government may extend the said benefit to the assessee in this country, by negotiations with the other countries, they could also be requested to extend the same benefit. If the contracting country agrees to extend the said benefit, then the assessee gets the relief. In another scenario, though the said

income is exempt in this country, by virtue of the agreement, the amount of tax paid in the other country could be given credit to the assessee. Thus for the payment of income tax in the foreign jurisdiction, the assessee gets the benefit of its credit in this country.

40. However, if the contracting country is not agreeable to extend the said benefits, then in terms of the agreement and probably in terms of the exemption granted, the assessee would be entitled to benefit only in this country on account of the exemption and the benefit in the other country is not extended. Thus when exemption is granted in respect of the income chargeable to tax under this Act in respect of which no benefit is granted in the corresponding country the assessee gets no benefit. However, if the benefit is extended to a portion of the income say for example 90% and 10% is subjected to tax then to that extent the assessee would be entitled to benefit of tax credit as he has paid tax in the foreign jurisdiction as per Section 90 (1)(a)(i) of the Act.

41. In this connection, it is contended on behalf of the Revenue that if the income is chargeable to tax in India, then only the assessee can have the benefit of tax credit in respect of the tax paid in foreign jurisdiction. In respect of exemption under Section 10A, the income derived is not included in the total income. It is not charged to income tax. Therefore, Section 90 of the Act has no application at all.

42. Section 4 of the Act is the charging section. It provides, "Where any Central Act enacts that income-tax shall be charged for any assessment year at any rate or rates, income-tax at that rate or those rates shall be charged for that year in accordance with, and (subject to the provisions (including provisions for the levy of additional income tax) of this Act) in respect of the total income of the previous year of every person".

Sub-section (2) of Section 4 provides, "In respect of income chargeable under sub- section (1), income-tax shall be deducted at the source or paid in advance, where it is so deductible or payable under any provision of this Act".

Section 2(45) of the Act defines total income as under:--

"Total income" means the total amount of income referred to in section 5, computed in the manner laid down in this Act.

Section 5 deals with the scope of total income. It reads as under :-
-

"(1) Subject to the provisions of this Act, the total income of any previous year of a person who is a resident includes all income from whatever source derived, which --

(a) is received or is deemed to be received in India in such year by or on behalf of such person, or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year; or

(c) accrues or arises to him outside India during such year".

The proviso speaks about a person not ordinarily resident.

43. Chapter III deals with Incomes which do not form part of Total Income. One such income which does not form part of a total income is contained in Section 10A; i.e. income of newly established undertakings in free trade zone, etc. Section 10A(1) provides, "Subject to the provisions of this section, a deduction of such profits and gains as are derived by an undertaking from the export of articles or things or computer software for a period of ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce such articles or things or computer software, as the case may be, shall be allowed from the total income of the assessee."

44. This provision provides for a deduction of profits or gains derived from export by an undertaking for a period of ten years. The profits and gains derived by such undertaking would form part of the income chargeable to income tax under Sections 4 and 5 of the Act. Therefore, when an assessee is having several undertakings, one of which falls under Section 10A, the assessee's entire income from all the undertakings is computed to arrive at the total income. However, the income from such undertaking

falling under Section 10A has to be deducted from the total income.

51. If section 10A is to be given effect to as a deduction from the total income as defined in Section 2(45), it would mean that section 10A is to be considered after Chapter VI-A deductions are given from out of the gross total income. The term "gross total income" is defined in section 80B(5) to mean the total income computed in accordance with the provisions of this Act, before making any deduction under this Chapter. As per the definition of gross total income, the other provisions of the Act will have to be first given effect to. There is no reason why reference to the provisions of the Act should not include Section 10A. In other words, the gross total income would be arrived at after considering section 10A deduction also. Therefore, it would be inappropriate to conclude that section 10A deduction is to be given effect to after Chapter VI-A deductions are exhausted.

52. Section 10A (1) speaks of "deduction". The deduction is of profits and gains for a period of ten consecutive assessment years. The said deduction is from the total income of the assessee. Therefore, the total income before allowing the said deduction includes the profits and gains from the business referred to in Section 10A(1). Section 5 of the Act explains the scope of total income to mean all income from whatsoever source derived. Section 4 of the Act charges this total income. However, Section 10A (1) provides that, subject to the provisions of the said Section, profits and gains derived by an undertaking referred to in that Section shall be allowed as deduction from the total income of the assessee. Therefore, by virtue of the aforesaid statutory provision namely Section 10A of the Act, the income of the assessee from exports in respect of the said unit is exempted from payment of income tax. The very fact that it is exempted from payment of tax means but for that exemption such income is chargeable to tax. This relief under Section 10A is in the nature of exemption although termed as deduction. But for this exemption, the said income namely profits and gains derived by an undertaking, is chargeable to tax under the Act. The said exemption is only for a period of ten years. After the expiry of the said ten years the said income is taxable. When such exemption is given under the Act, but the said income is taxed in foreign jurisdiction, there is no relief to the assessee at all. Therefore, to promote mutual economic

relations, trade and investment, the Act was amended by way of Finance Act, 2003 which came into force from 1.4.2004. By insertion of a new clause (ii) in sub- section (1)(a) of Section 90 the Central Government has been vested with the power to enter into an agreement with the Government of any country outside India for the granting of relief in respect of income tax chargeable under the Income Tax Act or under the corresponding law in force in that country, to promote mutual economic relations, trade and investment. Therefore, the statute by itself is not granting any relief. But, by virtue of the statute, if an agreement is entered into providing for such relief, then the assessee would be entitled to such relief.

53. Relying on the judgments in the case of Wallace Flour Mills Co. Ltd. v. Collector of Central Excise [1989] 4 SCC 592, and in the case of Kasinka Trading v. Union of India [1995] 1 SCC 274, it was held that merely because exemption has been granted in respect of the taxability of particular source of income, it cannot be formulated that the entity is not liable to tax as contended by the respondents.

54. In fact the Apex Court in the case of Kasinka Trading (supra), a case arising under Customs Act at para 21 has held as under:

'The power to grant exemption from payment of duty, additional duty etc. under the Act, as already noticed, flows from the provisions of Section 25(1) of the Act. The power to exempt includes the power to modify or withdraw the same. The liability to pay customs duty or additional duty under the Act arises when the taxable event occurs. They are then subject to the payment of duty as prevalent on the date of the entry of the goods. An exemption notification issued under Section 25 of the Act had the effect of suspending the collection of customs duty. It does not make items which are subject to levy of customs duty etc. as items not leviable to such duty. It only suspends the levy and collection of customs duty, etc. wholly or partially and subject to such conditions as may be laid down in the notification by the Government in "public interest". Such an exemption by its very ;nature is susceptible of being revoked or modified or subjected to other conditions. The supersession or revocation of an exemption notification in the "public interest" is an exercise of the statutory

power of the State under the law itself as is obvious from the language of Section 25 of the Act.'

55. Similarly, the Apex Court in the case of Wallace Flour Mills Co. Ltd. (supra) at para 4 has held as under:

'Excise is a duty on manufacture or production. But the realization of the duty may be postponed for administrative convenience to the date of removal of goods from the factory. Rule 9A of the said Rules merely does that. That is the scheme of the Act. It does not, in our opinion, make removal the taxable event. The taxable event is the manufacture. But the liability to pay the duty is postponed till the time of removal under Rule 9- A of the said Rules. In this connection, reference may be made to the decision of the Karnataka High Court in Karnataka Cement Pipe Factory v.

Supdt. Of Central Excise (1986 23 ELT 313) (Karn HC)), where it was decided that the words 'as being subject to a duty of excise' appearing in section 2(d) of the Act are only descriptive of the goods and do not relate to the actual levy. "Excisable goods", it was held, do not become non-excisable goods merely by reason of the exemption given under a notification.'

56. Therefore, it follows that the income under Section 10A is chargeable to tax under Section 4 and is includible in the total income under Section 5, but no tax is charged because of the exemption given under Section 10A only for a period of 10 years. Merely because the exemption has been granted in respect of the taxability of the said source of income, it cannot be postulated that the assessee is not liable to tax. The said exemption granted under the statute has the effect of suspending the collection of income tax for a period of 10 years. It does not make the said income not leviable to income tax. The said exemption granted under the statute stands revoked after a period of 10 years. Therefore, the case falls under Section 90(1)(a)(ii).

57. In the background of this legal position, we have to look into the Double Taxation Agreements entered into between India and United States, Canada.

(1) INDO-US AGREEMENT:

58. Article 25 of the Indo - US Double Taxation Agreement deals with Relief from double taxation. Clause 2(a) is the relevant provision. It reads as under:

"2.(a) Where a resident of India derives income which, in accordance with the provisions of this Convention, may be taxed in the United States, India shall allow as a deduction from the tax on the income of that resident an amount equal to the income-tax paid in the United States, whether directly or by deduction. Such deduction shall not, however, exceed that part of the income-tax (as computed before the deduction is given) which is attributable to the income which may be taxed in the United States."

59. A perusal of the aforesaid provision makes it clear that if a resident Indian derives income, which may be taxed in United States, India shall allow as a deduction from the tax on the income of the resident, amount equal to the income tax paid in United States of America, whether directly or by deduction. The conditions mandated in the treaty is that if any "income derived" and "tax paid in United States of America on such income", then tax relief/credit shall be granted in India on such tax paid in United States of America. The said provision does not speak of any income tax being paid by the resident Indian under the Income-tax Act as a condition precedent for claiming the said benefit. Where the Indian resident pays no tax on such income derived, whereas the said income is taxed in the United States, India shall allow as a deduction from the tax on the income of that resident an amount equal to the income-tax paid in the United States. Therefore, this provision is in conformity with Section 90(1)(a)(ii) of the Act i.e., the income tax chargeable under the income- tax Act and in the corresponding law in force in United States of America. Therefore, it is not the requirement of law that the assessee, before he claims credit under the Indo - US convention or under this provision of Act should pay tax in India on such income. However, the said provision makes it clear that such deduction shall not, however, exceed that part of the income tax (as computed before the deduction is given) which is attributable to the income which is to be taxed in United States. Therefore, an embargo is prescribed for giving such tax credit. In other words, the assessee is entitled to such tax credit only in respect of that income, which is taxed in the United States. This provision became necessary because the accounting year in India varies from the accounting year in

America. The accounting year in India starts from 1st of April and closes on 31st of March of the succeeding year. Whereas in America, the 1st of January is the commencement of the assessment year and ends on 31st of December of the same year. Therefore, the income derived by an Indian resident, which falls within the total income of a particular financial year when it is taxed in United States, falls within two years in India. Therefore, while claiming credit in India, the assessee would be entitled to only the tax paid for that relevant financial year in America, i.e., the income attributable to that year in America. In other words, the income tax paid in the same calendar year in United States of America is to be accounted for two financial years in India. Of course, this exercise should be done by the assessing authority on the basis of the material to be produced by the assessee.

52. In view of the above, we are of the considered view that the facts of the case in hand are in parity with the facts considered by the Hon'ble Karnataka High Court [supra] wherein Article 25 of Indo US DTAA has been elaborately explained by the Hon'ble High Court. The most relevant findings of the Hon'ble High Court are as under:

"Therefore, while claiming credit in India, the assessee would be entitled to only the tax paid for that relevant financial year in America, i.e., the income attributable to that year in America. In other words, the income tax paid in the same calendar year in United States of America is to be accounted for two financial years in India. Of course, this exercise should be done by the assessing authority on the basis of the material to be produced by the assessee."

53. The issue raised by the ld. DR has been answered by the Hon'ble High Court of Karnataka and therefore, needs no separate adjudication. Respectfully following the decision of the Hon'ble Karnataka High Court, we direct the Assessing Officer to consider the claim of foreign tax credit as per the directions of the Hon'ble Karnataka High Court mentioned elsewhere. The assessee is directed to furnish necessary evidences before the Assessing Officer. The additional ground is, accordingly, decided in favour of the assessee."

12. We find that the India-Japan DTAA is worded in similar lines with that of India-USA DTAA. Therefore, the aforesaid decision quoted by this Tribunal [supra] squarely applies on the facts of the case in hand. Therefore, we direct accordingly.

13. Next ground relates to application of incorrect rate of MAT.

14. We direct the Assessing Officer to consider the applicable rate of MAT for the year under consideration as per provisions of law.

15. In the result the appeal of the assessee in ITA No. 468/DEL/2021 is allowed.

The order is pronounced in the open court on 20.10.2021.

Sd/-	**Sd/-**
[AMIT SHUKLA] JUDICIAL MEMBER	[N.K. BILLAIYA] ACCOUNTANT MEMBER

Dated : 20th October, 2021

VL/

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	