



N. A. SHAH BULLETIN

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N. A. SHAH ASSOCIATES LLP
Chartered Accountants

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Executive Summary

Delhi High Court held that dividend paid by Indian company to Netherlands' resident is taxable at 5% by virtue of Most-Favored-Nation (MFN) clause read with DTAA's entered into by India with Slovenia, Lithuania and Columbia which provide for a beneficial withholding rate of 5% by stating that MFN clause in India-Netherlands Protocol should be applicable from date of their OECD membership.

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Concentrix Services Netherlands B.V. -V/s- Income Tax Officer (TDS)

Optum Global Solutions International B.V -V/s- DCIT

Facts of the case

- 1) Concentrix Services Netherlands B.V (“Concentrix Netherlands) and Optum Global Solutions International B.V (“Optum Netherlands) (“Collectively known as taxpayers”) are resident of Netherlands and hold 99.99% share in their Indian counterparts i.e. Concentrix India and Optum India respectively. Taxpayers were expecting to receive dividend from Indian Company.
- 2) The Taxpayers made an application for issue of lower withholding tax (WHT) certificate at a rate of 5% for dividend income from Indian Companies.
- 3) The lower WHT rate is based on Article 10 of the DTAA between India and Netherlands read along with the clause IV(2) of the Protocol. Conditions prescribed in Clause IV(2) of the protocol are mentioned hereunder:-
 - The third State with whom India enters into a DTAA is a member of the OECD.
 - India should have a rate lower or a scope more restricted, than the rate or scope provided in the subject DTAA.
- 4) Post entering into an Agreement with Netherlands, India has entered into tax treaty with Slovenia, Lithuania and Columbia, wherein, withholding tax rate prescribed on dividend is 5%. Dates of entering into DTAA and dates of these countries becoming members of OECD are as under:-

Country name	Date of execution of DTAA	Member of OECD since
Slovenia	17 th February, 2005	August, 2010

Lithuania	10 th July, 2012	July, 2018
Colombia	7 th July, 2014	April, 2020

- 5) Since, WHT rates specified in DTAA entered by India with the aforesaid countries is 5%, taxpayers are entitled to claim the benefit of protocol IV(2) of the DTAA between India and Netherlands and contended that dividend should be taxable at a rate of 5% instead of 10%.
- 6) However, the tax authority issued withholding certificate at the rate of 10% on the basis that DTAA provided for 10% source-taxation and MFN clause is not applicable as Slovenia, Lithuania, and Columbia were not members of Organization for Economic Co-operation and Development (OECD) when DTAA was executed between India and Netherlands but became members on later date(s).
- 7) Aggrieved by the 197 certificate, the taxpayers filed writ petitions before the Delhi HC

Issue before High Court

- Whether separate notification is required for applicability of provisions of the protocol?
- Whether based on the above facts, withholding tax rate on dividends should be considered at 10% or 5% based on the benefit of Most-Favored-Nation (MFN) clause read with other DTAA's?

Taxpayer's contention

- 8) In proposition that no fresh notification was required for applicability of protocol, taxpayers placed reliance on the judgement of Division Bench of this Court in ***Steria (India) Ltd. vs. Commissioner of Income-tax-VI***, [2016] 386 ITR 390 (Delhi)
- 9) Since India had entered into DTAA's with other countries which were members of OECD the lower rate or the restricted scope in the DTAA executed between India and such other country would automatically

apply to the subject DTAA as the protocols form an integral part of the convention.

- 10) Although Article 10(2) of India-Netherlands DTAA provides for a withholding tax rate of 10%, as per the Most-Favored-Nation (MFN) clause, clause IV. Ad Articles 10, 11 and 12 contained in the protocol appended to the subject DTAA, the rate should be restricted to 5% based on DTAA's entered into by India with Slovenia, Lithuania and Columbia.

Revenue's Contentions

- 11) Benefits of lower withholding can be provided only by amending the subject DTAA followed by issuance of notification. Since no such amendment has been made to the subject DTAA, the withholding tax cannot be lower than 10%.
- 12) Slovenia, Lithuania and Columbia were not members of the OECD when the subject DTAA was executed. Furthermore, DTAA's were signed with Slovenia, Lithuania and Columbia before they became members of OECD. Therefore, Clause IV (2) of the protocol will have no applicability.

Held

- 13) A perusal of the extract of the protocol would show that the protocol forms an integral part of the Convention. Therefore, on plain reading, no separate notification is required, as far as the applicability of provisions of the protocol is concerned. For the same Court also referred the judgement of Delhi High Court in the case of ***Steria (India) Ltd. vs. Commissioner of Income-tax-VI***, [2016] 386 ITR 390 (Delhi).
- 14) As per the principle of parity, the lower rate or restricted scope can be applied as per protocol. However, the principle of parity kicks-in, only if the following conditions are fulfilled:
 - i. First, the third State with whom India enters into a Convention/DTAA should be a member of the OECD.

- ii. Second, India should have, in its Convention/DTAA, executed with the third State, limited its rate of withholding tax, on subject remittances, at a rate lower or a scope more restricted, than the rate or scope provided in the subject Convention/ DTAA.
- 15) HC clarified that the word 'is' in Clause IV(2) of protocol which reads "which is a member of the OECD" describes the state of affairs when the DTAA is applied and not at the time when subject DTAA was executed
- 16) The HC then applied the Principle of "Common Interpretation" and also referred to the decree issued by the Kingdom of Netherlands on 28.02.2012 wherein it was interpreted that the lower rate of tax as per India-Slovenia Convention/DTAA will be applicable on the date when Slovenia became a member of the OECD, i.e., from 21.08.2010, although, the Convention/DTAA between India and Slovenia came into force on 17.02.2005.
- 17) Court also referred to the Supreme Court Ruling in **Azadi Bachao Andolan (2004) 10 SCC 1**, and held, "while interpreting international treaties ...the rules of interpretation that apply to domestic or municipal law need not be applied, for the reason, that international treaties...are negotiated by diplomats and not necessarily by men instructed in the law".
- 18) Therefore, the court held that dividend paid by Indian Companies to resident of Netherlands will bear a lower withholding tax rate of 5 per cent.

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We will be glad to provide any information, elaboration and elucidation you may need in this regard.

From:

N. A. Shah Associates LLP

Chartered Accountants

Address: B 21-25 / 41-45, Paragon Centre,
Pandurang Budhkar Marg, Mumbai – 400013.

Tel: 91-022-4073 3000, Fax: 91-022-4073 3090

E-mail Id: info@nashah.com