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

\+ W.P.(C) 5220/2022

THE MILESTONE AVIATION ASSET HOLDING GROUP NO. 25 LTD. .....Petitioner

Through: Mr. Sachit Jolly with Ms. Disha Jham, Ms. Soumya Singh, Mr. Devansh Jain & Mr. Raghav Dutt, Advs.

versus

ASSISTANT COMMISSIONER OF INCOME TAX CIRCLE 3(1)(1) INTERNATIONAL TAXATION NEW DELHI & ORS. .....Respondents

Through: Mr. Sunil Agarwal, SSC with Mr. Shivansh B. Pandya, Mr. Viplav Acharya, JSCs & Mr. Utkarsh Tiwari, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

O R D E R

% 29.08.2024

1. The instant writ petition impugns the reassessment action which has been initiated for **Assessment Year**[1] 2016-2017. As is manifest from the reasons which have been ascribed and which appear to have weighed upon the **Assessing Officer**[2] to come to the conclusion that income had escaped assessment was a receipt of INR 6,35,91,111/- by the petitioner from one M/s Global Vectra Helicorp Ltd during Financial Year 2015-2016. The respondent had proceeded on the assumption that the aforesaid receipt was on account of aircraft

[1] AY
[2] AO

leasing. It was on the aforesaid premise that the AO had proceeded to hold that the consideration received by the writ petitioner would be in the nature of "royalty" for use of aircraft and thus taxable both in terms of Section 9(1)(vi) of the **Income Tax Act,1961**[3] as well as the provisions of the India-Ireland **Double Taxation Avoidance Agreement**[4].

2. It is in the aforesaid context that Mr. Jolly, learned counsel appearing for the writ petitioner draws our attention to Article 12 of the DTAA and which in unambiguous terms exempts revenue receipts from aircraft leasing from the purview of taxation altogether. Article 12 of the DTAA reads as follows:-

> "1. Royalties or fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.
> 2. However, such royalties or fees for technical services may also be taxed in the Contracting State in which they arise, and according to the laws of that State, but if the recipient is the beneficial owner of the royalties or fees for technical services, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties or fees for technical services.
> 3. (a) The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph film or films or tapes for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process or for the use of or the right to use industrial, commercial or scientific equipment, other than an aircraft, or for information concerning industrial, commercial or scientific experience;
> (b) The term "fees for technical services" means payment of any kind in consideration for the rendering of any managerial, technical or consultancy services including the provision of services by technical or other personnel but does not include payments for services mentioned in Articles 14 and 15 of this Convention.
> 4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties or fees for technical services, being a resident of a Contracting State, carries on business in the

[3] Act
[4] DTAA

other Contracting State in which the royalties or fees for technical services arise through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the royalties or fees for technical services arc paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 14, as the case may be, shall apply.

5. Royalties or fees for technical services shall be deemed to arise in a Contracting State when the payer is that State itself, a political sub-division, a local authority or a resident of that State. Where, however, the person paying the royalties or fees for technical services, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the liability to pay the royalties or fees for technical services was incurred, and such royalties or fees for technical services are borne by such permanent establishment or fixed base, then such royalties or fees for technical services shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.

6. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties or fees for technical services, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention."

3. We find that it is the respondent who had proceeded on the premise that the revenue and consideration received was in connection with aircraft leasing and would thus amount to "royalty" by virtue of the relevant provisions of the DTAA. However, on a plain reading of Article 12 (3)(a) of the DTAA, the view as taken is rendered wholly unsustainable.

4. We are also of the considered opinion that it would be wholly impermissible for the AO to invoke Section 9(1)(vi) of the Act in light of the express exemption under the DTAA. Insofar as the question of

interplay between provisions contained in a domestic legislation and those in the DTAA, we have in **Commissioner of Income Tax-International Taxation -3 Vs. Telstra**[5] already held that the latter would override being more beneficial to the assessee. Our conclusions as set out in para 69 of the report are extracted hereunder:-

> **"69.** Once we recognise the Convention as the constant, it becomes apparent that changes in domestic legislation cannot, principally speaking, override the treaty provisions. If a contrarian position were to be accepted, it would lead us to hold that treaty provisions could be amended or overcome based upon the will of Legislatures of independent nations to amend domestic legislation unilaterally and without being bound by the Convention. That is clearly not the position which merits acceptance from either a constitutional or statutory point of view. It is this fundamental position which appears to have weighed upon the Court in *New Skies Satellite* to observe that a treaty cannot be overridden by independent legislative amendments that a contracting nation may choose to introduce. The fact that treaty provisions supervene and the option available to the assessee to opt for the more beneficial scheme stands statutorily recognised and reiterated in Section 90(2) of the Act."

Accordingly, and for the aforesaid reasons we find ourselves unable to sustain the reassessment action.

5. The writ petition is accordingly allowed. The impugned notice referrable to Section 148 dated 31 March 2021 is hereby quashed and set aside.

6. It is however left open to the respondents to draws such proceedings as may be otherwise permissible in law.

YASHWANT VARMA, J

RAVINDER DUDEJA, J

AUGUST 29, 2024
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[5] 2024 SCC OnLine Del 5016