



International Double Taxation Relief Provisions in India : A Critical Analysis

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ABSTRACT

International double taxation of income has been a subject of frequent debate in courts in India and abroad. Double taxation of income arises essentially when two or more countries impose taxes on the same income of a taxpayer who happens to be a resident in one country but has a certain source of income arising or accruing to him in another country (known as the source country). In view of the importance of providing double taxation relief to taxpayers, the present paper attempts to describe the historical perspective with regard to the development of Model Conventions that could be used by two different countries as the basis for formulating and entering into that double taxation avoidance agreements (DTAAs), also known as tax treaties. In this context, the Model Conventions developed by the League of Nations, the Organisation for Economic Cooperation and Development (OECD) and the United Nations (UN) have been discussed. The present paper also specifically discusses the Indian law on double taxation relief as provided under Sections 90, 90A and 91 of the Income-Tax Act 1961. Finally, it has been suggested that DTAAs should not be misused for such purposes as 'double non-taxation' and 'treaty shopping'.

Keywords: Double taxation; Model conventions; DTAA; Residence principle, Source principle.

1.0 Introduction

The concept of double taxation has been a subject matter of frequent debate in Courts in India and abroad from time to time. In *LakshmiPat Singhania versus CIT* (1969) 72 ITR 291 (SC), the Supreme Court made it clear that “it is a basic rule of the law of taxation that unless otherwise expressly provided, income cannot be taxed twice. In fact, double taxation is said to take place when a taxpayer happens to be a resident assessee in one country but has a source of income in another country (where the

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business establishment is situated or where the asset or property is located), and both the countries charge tax on the same income. Thus, double taxation of the same income arises in this case due to the overlapping claims of two or more countries on this income. As defined by OECD, double taxation is “the imposition of comparable taxes in two or more States on the same tax payer in respect of the same subject matter for identical periods (OECD, 1977).” In this case, one country claims its authority to impose tax on the basis of the residence or citizenship of the taxpayer while another country claims taxing authority based on the source where the income arises or accrues. Another possible source of double taxation can be that both countries claim either a certain taxpayer as a resident or that an income arises within its country (Doernberg, 2004). Still another source of double taxation can be due to different methods for the determination of the internal transfer price applied in two States.

According to the provisions of the Income-Tax Act, 1961, the income tax liability of an assessee depends upon his residential status during the relevant previous year. In the case of a resident assessee, he is liable to pay tax on all incomes accruing or arising outside India and also received outside India during the previous year. Although this position generally prevails in many other countries too, it is often found that a person may be a resident in more than one country or that the same item of income belonging to him may be regarded as accruing or arising or received in more than one country. In this case, therefore, the same item of income becomes chargeable to tax in more than one country. In such situations, the taxpayer may be provided with relief against such hardships in the following two ways : (1) Bilateral relief; and (2) Unilateral relief.

1.1 Bilateral relief

The governments of two countries may enter into bilateral agreements in order to provide relief against such double taxation (known as Double Taxation Avoidance Agreement). This scheme of bilateral relief lays down the basis of relief to be granted by either of the two countries. In fact, the agreement for providing bilateral relief may be based upon any of the following two methods :

1.1.1 Exemption method

This method involves an agreement in which two countries agree that incomes arising from different sources which are likely to be taxed in both the countries as per their respective income tax law should either be taxed in one of these two countries or that a specified portion of such incomes should be taxed by each country so that there is

no overlapping taxation in this case. This kind of agreement results in a complete avoidance of double taxation of the same income in both the countries.

1.1.2 Tax credit method

The agreement based on the tax credit method merely provides that if any income is taxed in both the countries, the assessee is to be provided with relief in a particular manner. Under this method, the particular incomes of the assessee must be taxed in both the countries but the assessee is also provided with a certain deduction from his income tax liability in India. This deduction is generally equal to the lower of the taxes paid in the two countries.

1.2 Unilateral relief

The scheme of bilateral relief as described above may not be sufficient enough to meet the demands of all cases or situations. In the absence of any double taxation avoidance agreement between the home country and any other country, some relief from double taxation may be provided by the home country to the concerned taxpayers. This relief from double taxation is known as the scheme of unilateral relief.

2.0 Historical Perspective

In view of the problems associated with double taxation, there was a particular need to develop a model agreement that could be used by two different countries as the basis for making bilateral discussions with a view to formulating and entering into a Double Taxation Avoidance Agreement (DTAA). The League of Nations developed the first model bilateral convention in 1928, followed by the model convention of Mexico in 1943 and the London model convention in 1946. Although the initial objective of the League of Nations was to draft a model multilateral treaty, the governments of different nations were in favour of developing a model convention that could be utilised for making bilateral agreements. In addition, they favoured the model convention to be non-binding in character so that it would offer necessary flexibility to different nations to make their tax systems compatible to one another (Picciotto, 1992, p. 38).

It is significant to note that from 1950 and onwards, the Organisation for Economic Cooperation and Development (OECD) has come forward to act as the main multilateral policy forum for promoting useful discussions of international tax issues. In fact, the OECD developed its first Model Convention in 1963 and then came up with a revised version (known as the OECD Model Convention and Commentaries) in 1977. Subsequently, the OECD published a Model Convention in 1992 in loose-leaf format

with a view to facilitating better adaptation to changes in the economic environment. Since then, the Model Convention has been continuously updated with the consolidated versions being made available from time to time. Although the OECD Model Convention is primarily meant for its member countries, it is often used for interpreting the DTAAAs between countries who are not members of OECD.

It may be further noted that the United Nations developed a Model Convention through a resolution passed by the ECOSOC (Economic and Social Council) in August 1967 and published in 1980. The UN Model Convention contains many of the features of OECD Model Convention and is generally considered as being more favourable towards developing nations as it leans more towards the source principle of taxation (rather than residence based taxation). Although the UN Model Convention has had limited impact, many developed countries subsequently granted more taxation at source in their bilateral treaties with developing or transition economies (Kosters, 2004, p. 4).

The growth rate of bilateral tax treaties has been quite significant especially after the development of the OECD Model Convention. As noted by Barthel, Busse, and Nenmayer (2009, p. 3), “the pace of treaty conclusion has increased tremendously over the last decades : from an annual average of nearly 18 new conventions during the 1960s, to 58 DTTs per year in the 1980s, more than 80 in the 1990s, and reaching a peak with 117 newly concluded treaties in 1998. Since then, the expansion has lost some momentum, but has remained at a high average of 92 new DTTs per annum in 2004-2007”. Similarly, Ahuja(2015, p. 5 & 6) noted that “Considering the year 2000 and 2001 the number of DTAAAs signed increased from 2118 to 2185. This covered 63 countries of which 19 are developed, 30 developing and 14 Central and Eastern Europe. 23% of the DTAAAs are between developed and developing nations (UNCTAD, World Investment Report, 2002). 2976 treaties are signed by the end of 2010 (UNCTAD, 2011).” Even though the model convention is not binding on different countries in concluding bilateral tax treaties, almost all tax treaties that exist today are based on the adaptation of certain provisions of the Model Convention to the individual needs of different countries.

3.0 Mechanics or Principles of Double Tax Avoidance

As stated earlier, double taxation results from the overlapping tax claims of two different States i.e. that is the 'Resident State' in which the income recipient lives and the Source State' in which income of the taxpayer was generated. If both the concerned States or countries exercise their taxing authorities to the fullest possible extent, then the burden of taxation becomes too high and affects trans-border economic activities quite significantly. As stated by Egger et al. (2006, p. 902), “One of the most visible obstacles

to cross-border investment is the double taxation of foreign earned income.” Therefore, a major objective of double taxation avoidance agreements is the encouragement of foreign direct investment (FDI) through the provision of double taxation relief to foreign investors. Another important objective of DTAA is to check tax avoidance and tax evasion and also prevent double non-taxation through the exchange of information between the contracting States. On account of these important factors, the concerned contracting States have a common interest in avoiding double taxation of incomes.

In view of the above mentioned facts, the concerned countries must agree on some rules to share the taxation jurisdiction between them. In fact, the relevant rules specified in various Model Conventions (MCs) have been used as the basis for settling the conflicting tax claims of different countries against each other on a case-by-case basis (Graetz, 2001). The jurisdiction to charge tax is assigned to either the source country or the residence country in relation to different types of incomes. These rules contained in Articles 6 to 22 of the OECD model “perform the function of dividing items of income between countries. They are a set of arbitrary rules that were carefully crafted to support a specific compromise” (Brauner, 2003, pp. 278-279). Article 6 specifies that income derived by a resident of one country from immovable property located in another country will be chargeable to tax in that source country. According to Article 7 of the OECD MC, business profits can only be taxed in the source State provided such profits can be attributed to a permanent establishment as defined in Article 5. As per the provisions of Articles 10-12 of the OECD MC, dividends, interests, royalties and fees for technical services can be made taxable in the source country only to a limited extent. In this context, it may be noted that India generally follows the UN Model for taxation of various sources of income like dividends, interest, royalty, and technical fees (Jain, 2014, p. 60”).

According to the rules contained in tax treaties, the country of residence of the taxpayer must provide for double taxation relief in cases where incomes have already been taxed in the source country either fully or partially. This is done either by exempting such income (taxed in the source country) in the home country or by allowing a credit for the tax paid in the source country on the tax which is due in the home country. This specific rule has been contained in Article 23 of the OECD MC. At the same time, it must be noted, however, that almost all countries provide for unilateral relief in the form of either exemption of foreign income from taxation or grant of credit for taxes already paid on such income in the source country or the foreign country. In these cases, double taxation of income is already prevented. As mentioned earlier, such unilateral relief is provided by the home country in the absence of any DTAA with a foreign country.

Thus, the above provisions of the OECD Model Convention explain the taxability of various incomes in the country of residence or in the source country or in both. The DTAA's framed by the contracting countries help in determining the jurisdiction of the contracting parties in taxing a particular income. A DTAA, may, for example, provide that income from immovable property may be made taxable in the source country in which the said property is situated. Here, a pertinent question arises as to whether the home country being the country of residence is also entitled to tax the same income. If it is so, the owner of such property will claim credit in his home country for the tax paid in the source country where the property is located. In regard to the taxability of business profits, such profits are generally taxable in the country of residence unless this concerned business entity has a permanent business establishment in the source country, and it earns business profits therefrom.

As per the judgements of the Madras and Karnataka High Courts in *CIT versus V.R.S.R.M. firm and others* (208 ITR 400) and *CIT versus R.M. Muthaiah* (1993) 202 ITR 508 (Karnataka), it has been clearly held that when a particular income has been provided to be taxable in one of the contracting States, such income will not be made taxable in the other State. This particular decision in Muthaiah's case has been upheld by the Supreme Court too in its *Azadi Bachao Andolan Case* (2003) 263 ITR 706 (SC). In *CIT versus Kulandagan Chettiar and Other Appeals* (2004) 267 ITR 654 (SC), the Supreme Court ruled that if the taxpayer was a resident assessee in India and owned immovable property or had a permanent business establishment in Malaysia, then it was only Malaysia which possessed the right to charge tax on such property income or business income. Regarding the taxability of incomes accruing to the taxpayer by way of dividends, interests, royalties and fees for technical services, the right to tax such incomes is vested with the country of residence but at the same time, such incomes may also be taxed in the source country. In this case, the OECD Model Convention has formulated two alternative Articles (in the form of 23A/ 23B) for granting benefit to the taxpayer through the exemption or credit method.

4.0 Benefits and Costs of Double Taxation Avoidance Agreements

As mentioned earlier, double taxation avoidance agreements are primarily intended to provide tax relief to taxpayers whose incomes have been doubly taxed in the home country and in some other country. In certain cases, DTAA's also provide for the taxation of the same income in either the home country or the source country so that double taxation is avoided. In fact, the DTAA's lay down clear-cut principles of division of tax revenues between two countries, exempt certain incomes from taxation in any of

the two countries, and reduce the income tax rates on certain incomes which are taxable in either of the two countries. In addition, the tax treaties help a taxpayer in knowing with greater accuracy the maximum limits of his tax liability in another country and thereby encourage him to make cross-border Investments. Still another benefit of DTAA is that these treaties provide for non-discrimination of foreign taxpayers or the permanent business establishments situated in the source countries. In view of these benefits of tax treaties, each contracting country is assured of a reasonable share of tax revenues and, therefore, both the bilateral and the multilateral trade prospects improve considerably. Therefore, Ahuja (2015, p.4) has rightly observed that “DTAA provides for a uniform agreed definition for taxes, tax base, allocation of tax right and provisions for taxing income in respect of foreign investors to avoid double taxation. It reduces the uncertainty with respect to how profits will be taxed.”

It may be further noted that the tax regulations, methods of tax calculation etc. prevailing in two different countries are often harmonized in a tax treaty. This helps in reducing the investors' uncertainties while dealing with the fiscal systems of a foreign country. As noted by Murthy and Bhasin (2015), the implementation of DTAA had a positive impact on the flow of FDIs into India. Such tax treaties mitigated the problems of international double taxation and created an environment of legal and fiscal certainty.

DTAAs also help in reducing harmful international tax competition from tax havens. These tax treaties include certain regulations such as the permanent establishment rule, provisions against treaty shopping etc. which help in limiting the number of beneficiaries and reducing the opportunities for channelizing incomes through tax havens. In addition, it is argued that DTAA ensure information sharing and thereby minimise the scope for the utilisation of certain legal tax saving devices (e.g. transfer pricing). This leads to a decrease in both tax evasion and tax avoidance.

Although the DTAA have certain benefits as discussed above, these treaties have certain limitations too. The lengthy and arduous negotiations involved and the subsequent ratification of the treaty often result in high cost to the contracting parties. Another major limitation is that the provisions of the treaty may be in conflict with those of income tax laws of the contracting countries. In this case, the fiscal sovereignty of these countries may be curtailed. In addition, it is significant to know that there is a possibility of loss of tax revenues as the treaties often favour residence based taxation over source based taxation. Since there are substantial differences in FDI flows between developing and developed nations, it has been found that the developing nations are net capital importers. As a result of this, a double taxation treaty often leads to loss of tax revenues in developing countries as compared to the developed ones.

5.0 Double Taxation Relief Provisions in India

In the context of providing double taxation relief to the taxpayers, the Indian Income Tax Act 1961 contains explicit provisions conferring “the power of the Central Government to enter into agreements with foreign countries for the avoidance of Double Taxation as contained in Chapter 9 of the Income Tax Act.” In fact, Sections 90 and 91 of the Income Tax Act, 1961 contain necessary provisions intended to save the taxpayers from double taxation of incomes. Section 90 of the Act deals with the cases of taxpayers who have already paid tax on certain incomes to a foreign country with which India has entered into double taxation agreement. On the other hand, Section 91 is concerned with those taxpayers who have paid taxes to a foreign country which has no double taxation agreement with India. This is how the Indian Income Tax Act saves these two types of taxpayers from double taxation of the same incomes in two different countries and thereby protects their financial interests.

5.1 Double taxation relief where tax treaty exists (Section 90)

Section 90 of the Income Tax Act 1961 provides bilateral relief to taxpayers through tax treaties. It may be noted that Double Taxation Avoidance Agreements (also known as Treaties) are not intended to cover cases only in relation to avoidance of double taxation. In fact, these agreements can be of different types and can cover many other situations too. Section 90 of the Income-Tax act empowers the Central Government to enter into an agreement with the Government of any country outside India, or specified territory outside India to provide for the following :

"(a) granting of relief in respect of –

(i) Income on which income tax has been paid both in India and in that country or specified territory, as the case may be ; or

(ii) Income-tax chargeable in India 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) the type of income which shall be chargeable to tax in either country or specified territory, as the case may be so that there is evidence 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.”

“In addition, the Central Government may enter into an agreement to provide :

(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 country as the case may be.”

The above provisions of Double Taxation Avoidance Agreement will be applicable between the concerned countries, and the modalities for providing bilateral relief to the concerned taxpayers will have to be worked out by the governments of the concerned countries. It must be emphasized that in case there is a difference between the provisions of the Income Tax Act and the Agreement concluded under Section 90 of the Act, the provisions of the Agreement reached by the States will have predominance over the Income-Tax Act. In this case, the provisions of the Agreement can be enforced by the Appellate Authorities and the Courts (*CIT versus Muthaiah*, 1993). It must be noted, however, that the provisions of the Income Tax Act will be applicable to the assessee in case these are more beneficial to him (*Arabian Express versus UOI*, 1995). It must be further noted that where the DTAA does not contain any specific clause, the basic provisions of the Income-Tax act will prevail in the computation of the taxable income of an assessee. If, however, the DTAA provides for the computation of income according to a particular mode, the same mode of computation must be followed, regardless of the provisions of the Income Tax Act.

As per Section 90(2) of the Income Tax Act, 1961, if India has concluded a DTAA agreement with any other country, then in this case the assessee has to decide as to which provision is more beneficial for him and accordingly, that provision will become applicable. The Supreme Court of India recognised the same principle in the famous case ‘Union of India versus Azadi Bachao Andolan (2003)’. In this context, another important question arises as to whether an assessee can follow the provisions of the Indian Income Tax Act for one type of income (e.g. income from business) and those of the DTAA for another type of income (say, capital gain). If the language of Section 92 of the Income Tax Act, 1961, is properly interpreted, then it follows that an assessee should be allowed to follow the provisions of the Income Tax Act for a particular type of income and the provisions of the DTAA for another type of income. Similarly, an assessee can opt for being governed by the provisions of the DTAA in one year and by the Income Tax Act in another year.

5.2 Double taxation relief (Section 90A)

According to the provisions of Section 90A, any specified association in India may reach an agreement with any specified association in a specified territory outside India. In this case, the Central Government will make necessary provisions for the

adoption and implementation of such agreement for granting double taxation relief, for avoiding double taxation, for exchanging information for the purpose of preventing evasion or avoidance of income tax or for recovery of income-tax. In addition, it is provided that the provisions of the Income Tax Act, 1961 will apply to the concerned assessee (to whom the said Agreement applies) provided such provisions are more beneficial to the concerned assessee.

6.0 Unilateral Relief where No Tax Treaty Exists (Section 91)

Section 91 provides unilateral relief to taxpayers if he has paid taxes in another country with which India doesn't have double taxation avoidance agreement. In other words, Section 91 comes into force only in a case in which no relief can be granted under Section 90. It may be further noted that unilateral relief under Section 91 will be granted only when the following conditions are satisfied:

- (1) "The assessee in question must have been resident in India in the previous year.
- (2) That some income must have accrued or arisen to him outside India during the previous year and it should also be received outside India. Before any such relief is computed, the assessee has to prove that such income is not deemed to accrue or arise in India during the previous year.
- (3) The income should be taxed both in India and in a foreign country and there should be no reciprocal arrangement for relief or avoidance from double taxation with the country where income has accrued or arisen.
- (4) In respect of that income, the assessee must have paid by deduction or otherwise tax under the law in force in the foreign country in question in which the income outside India has arisen."

If all the above-mentioned conditions are fulfilled, then such person will be granted a deduction (from the amount of Indian income tax payable by him) of an amount computed on the said doubly taxed income –

- (a) at the average Indian rate of tax or the average rate of tax of the said country, whichever is lower, or
- (b) at the Indian rate of tax if both the rates are equal.

7.0 Double Non-taxation

The above discussions on double taxation make it abundantly clear that if a particular income of the assessee has been taxed in the source country, then such income cannot be taxed in the country of residence of the taxpayer. There is a possibility of

double non-taxation in this case as the source country may not tax such income as a matter of providing tax incentive to the taxpayers. Therefore, in this situation, even though the source country has the jurisdiction to tax that income, it chooses not to tax the same income. It is generally viewed that a DTAA should not be so interpreted as to give rise to double-taxation as its basic objective is to ensure the avoidance of double taxation. The underlying reason is that the country of residence always has the inherent right to tax the income of a resident assessee. Therefore, in the above case, even if the source country decides not to tax any particular income of the taxpayer, India being the country of residence can tax the same income.

It must be pointed out that the above viewpoint should not be accepted easily as a DTAA must be interpreted strictly as per its own terms or conditions even though it might result in double non-taxation of a particular income. The Supreme Court has clearly expressed its view that a possibility of double non-taxation is an irrelevant issue. In the *Azadi Bachao Andolan* case (2003) 263 ITR 706 (SC), the Mauritian investors claimed that capital gains arising or accruing to them due to sale of shares of an Indian company will be taxable only in Mauritius according to the provisions of Article 13 of the Indo-Mauritius DTAA. Although it was also observed that such capital gains were not chargeable to tax as per Mauritian law, the Supreme Court still upheld the claims of Mauritian investors. Similarly, in *CIT vs Laxmi Textile Exporters Ltd.* (2000) 245 ITR 521 (Mad.), the assessee being an Indian resident was having a business in Sri Lanka along with a permanent establishment therein. Even though such business income was not taxable in Sri Lanka, the Madras High Court ruled that this position would not confer any right on India being the State of residence to tax the same income.

8.0 Treaty Shopping

The fact that the provisions of a Treaty prevail over the Income Tax Act to the extent that these are more favourable to the assessee gives rise to the problem of 'Treaty Shopping'. Therefore, the assessee often feels tempted to enter into a transaction with a country which has a more favorable treaty with India in comparison with the provisions of the Income-Tax Act, 1961. The Indo-Mauritius treaty serves as a good example in this regard. An assessee will try to conduct his transaction in a manner so as to get the benefits of the Indo-Mauritius Convention by incorporating a company in Mauritius, even though the person associated with the company may be staying in some other country. This is called 'Treaty shopping', which is often misused by the foreign entities with a view to avoiding the payment of taxes. It has been observed that more than 40% of the total FDI in India comes through the route of Mauritius since as per the provisions

of the Indo-Mauritius Treaty, capital gains are taxable in the country of residence of the concerned taxpayer. At the same time, it must be noted that no tax is chargeable on capital gains arising due to the sale of shares in Indian companies under the tax laws of Mauritius. In this process, all the FDIs coming through the channel of Mauritius and being invested in Indian companies get exempted from taxes. It may be further noted that 'Treaty shopping' can also be resorted to in cases where the rate of tax of one country is lower than that of another country.

The Supreme Court dealt with the issues relating to treaty shopping quite extensively in its famous case *Union of India versus Azadi Bachao Andolan* (2003) 263 ITR 706 (SC). It held that if the intention of a DTAA is to deny the benefits of its favourable terms to a national of a third country, then a specific provision to this effect must be included in it. In the absence of such limiting provision in the DTAA, the benefits of favourable terms of the treaty cannot be denied to any assessee.

9.0 Conclusion

It may be mentioned that India has entered into tax treaties with various countries, thus providing double taxation relief to the taxpayers and thereby increasing the free flow of FDI into and from India. However, there is a need to restructure the international tax regime continuously so as to respond to the emerging challenges all over the world. More specifically, the DTAA has to be correctly interpreted especially when there is a conflict between the clauses of the DTAA and the provisions of the Income Tax Act. In any case, the correct interpretation of the DTAA has to be based on the ultimate guiding principle that the provisions of the Act will prevail when these are more beneficial to the assessee as compared to the provisions of the agreement. However, when the provisions of the Agreement are more favorable to the assessee than those of the Act, then in this case the provisions of the Agreement will prevail.

Another significant point to be noted is that the DTAA should not be misused for promoting double non-taxation or treaty shopping as discussed beforehand. In fact, it is most essential that the DTAA should contain a clear-cut provision, which prevents DTAA from being utilised for such unintended purposes.

In addition, it may be noted that the various Court decisions regarding different clauses of the DTAA become applicable to similar cases involving similar clauses of DTAA between India and certain other countries. In fact, the rules of interpretation are flexible enough to provide freedom to a judge to interpret the clauses of a treaty in such a manner that the causes of justice are promoted further. If a judge wants to interpret the clauses of a tax treaty strictly as per its terms, he can cite the rule enunciated in *Cape*

Brandy Syndicate versus IR (1921). In this context, it might be further noted that the rule of construction is just opposite to the above-mentioned rule of interpretation. If a judge so desires, he can supplement the written rules with his own interpretation with a view to realising the intentions of the legislature. In this process, however, it must be ensured that the basic provisions of the statute are duly protected and considered without any alteration.

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