
ELIGIBILITY OF US BASED LIMITED LIABILITY COMPANY TO AVAIL BENEFITS UNDER THE INDIA-USA DTAA

The Income-tax Appellate Tribunal (“**the Tribunal**”) in a recent decision¹ has held that US based Limited Liability Company (“**LLC**”) qualifies as ‘Resident’ under Article 4 of the India-USA Double Taxation Avoidance Agreement (“**DTAA**”) and is, accordingly, eligible for benefits under the said DTAA.

Factual background

In the return of income filed in India, the assessee offered for tax income in the nature of Fees for Technical Services (“**FTS**”) at lower rate of 15% provided under Article 12 of the India-USA DTAA as against tax rate of 25% prescribed for FTS under the Income-tax Act, 1961.

The assessing officer/ DRP denied the benefit of lower rate provided in the DTAA basis the following reasons:

- LLC being a fiscally transparent entity does not qualify as ‘Resident’ under Article 4 of the India-USA DTAA as income of the LLC is not ‘liable to tax’ in USA; and
- LLC is not covered under paragraph (1)(b) of Article 4 of the DTAA, which applies only to partnership, estate or trust.

Decision of the Tribunal

In appeal filed by the assessee against the aforesaid findings contained in the final assessment order, the Tribunal referred to Publication 3402² and noted that LLC is a business entity recognized by the US under State law; for federal income-tax purposes, LLC with single member is considered as a disregarded entity unless the LLC elects to be treated as Corporation, while LLC with at least 2 members is classified as a partnership. Where LLC is disregarded as separate from its owner for federal income-tax purposes, its income, deductions, gains, losses and credits are reported in the income-tax return of the owner; in other words, the owner of a disregarded LLC pays tax on the owner’s share of the taxable income attributed from the LLC.

In view of the aforesaid, the Tribunal held that LLC is essentially ‘liable to tax’ in USA; tax on its income is, however, imposed upon and paid by its owner who merely discharges the tax that is assessable in the hands of the LLC.

For arriving at the aforesaid findings, the Tribunal also placed reliance on the Tax Residency Certificate (“**TRC**”) issued by the Internal Revenue Service in Form 6166 to hold that the TRC itself certifies that the Appellant is a US resident for the purpose of US Taxation and in the case of fiscally transparent entity, its partners/ members/ owners/ beneficiaries file income-tax returns as residents of US.

¹ *General Motors Company USA vs ACIT*, order dated 05.09.2024 in ITA No.2359/Del/2022

² Department of the Treasury, Internal Revenue Service of USA

It is also important to note that the Tribunal has held that LLC is organized as ‘body corporate’ inasmuch as it fulfils all the requirements in the form of separate existence of the entity from its members and perpetual existence distinct from its members, thereby, qualifying the LLC as ‘Person’ for the purposes of the DTAA.

Apropos the other allegation of the lower authorities regarding LLC not being covered by Article 4(1)(b), the Tribunal interpreted the same as being an exclusion provision which only seeks to exclude such income of, *inter alia*, a partnership which is not ‘subject to tax’ in the US either in the hands of the partnership or its partners. It was held that a fiscally transparent partnership was already regarded by the DTAA as ‘liable to tax’ and that the said paragraph (1)(b) only determines the scope of eligibility of such fiscally transparent partnerships to avail the benefits of the DTAA by excluding income which is not ultimately ‘subject to tax’ in the US (on account of such partners not being resident of USA).

VA Comments

The well-reasoned decision of the Tribunal is a welcome one, considering that many US based LLCs were hitherto evaluating the stand to be taken by them regarding benefits available under the India-USA DTAA. The decision affirms the eligibility of US based LLCs to avail treaty benefits, to the extent their income from India is ultimately subjected to tax in the US. That portion of the income which is not subjected to tax in the US on account of members of the LLC not being resident of US will not be eligible for treaty benefits.

While there were decisions from different benches of the Tribunal³ affirming the eligibility of fiscally transparent partnership firms/ Limited Liability Partnerships to avail beneficial provisions of different tax treaties to the extent their income was subjected to tax in the country of residence, the eligibility of entities structured as LLCs was up for debate.

The findings of the Tribunal regarding LLC qualifying as ‘Person’ are significant and in consonance with the 2017 Update to the OECD Model Tax Convention dated 21.11.2017 wherein it is provided that the term ‘person’ has not been exhaustively defined and would need to be interpreted widely; the same “*includes any entity that, although not incorporated, is treated as a body corporate for tax purposes*”.

Reference may also be made to another recent decision of the Tribunal⁴, wherein placing reliance on the TRC issued by the US Authorities and the findings of the Supreme Court⁵

³ *Herbert Smith Freehills* [2023] 198 ITD 633 (Delhi Trib.); *Linklaters LLP vs ITO* 40 SOT 51 (Mum); *DDIT vs AP Moller* [2013] 158 TTJ 537 (Mum)

⁴ *Wild West Domains, LLC vs ACIT*, order dated 29.07.2024 in ITA No.1774/Del/2022 (Del Trib.)

⁵ *Union of India vs Azadi Bachao Andolan* 263 ITR 706 (SC)

that 'liable to tax' does not equate to 'actual payment of tax', benefits under the DTAA were allowed to the US based LLC.

It is also pertinent to note that the view taken by the Tribunal is in congruence with the decisions of the Tax Court of Canada⁶ and the Supreme Court of Korea⁷.

While the ruling provides clarity on the subject, an express agreement between the competent authorities of India and USA regarding eligibility of LLCs or disregarded entities to claim benefits under the DTAA would bring quietus to the matter. Significant to note that such agreements have been negotiated between the US and other jurisdictions, including Spain, France, Mexico, Canada, etc. by way of Protocol to the existing treaties or otherwise.

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⁶ *TD Securities (USA) LLC vs Her Majesty the Queen* [2010] TCC 186

⁷ *Dongwon Enterprise vs Seocho District Tax Office Chief* 2012Du11836