IT/ILT: US entity has to furnishing evidences, including tax residency certificate, under section 90(4) in support of its entitlement to benefits of Indo US tax treaty benefits

• Form W9 is given for providing correct TIN to person who is required to file an information return with IRS; it is wholly irrelevant in respect of tax withholdings outside United States as it is merely a declaration by a US based entity which cannot be treated as a certification by any authority.

• Without giving an opportunity, an eligible assessee cannot be declined treaty protection under section 90(2) merely on ground that said assessee has not been able to furnish a Tax Residency Certificate in prescribed Form.

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[2018] 94 taxmann.com 448 (Ahmedabad - Trib.)

IN THE ITAT AHMEDABAD BENCH 'D'

Skaps Industries India (P.) Ltd.

v.

Income Tax Officer

PRAMOD KUMAR, ACCOUNTANT MEMBER
AND MADHUMITA ROY, JUDICIAL MEMBER
IT APPEAL NOS. 478 AND 479 (AHD.) OF 2018
[ASSESSMENT YEARS 2013-14 AND 2014-15]
JUNE 21, 2018

S.N. Soparkar and **Parin Shah** *for the Appellant.* **V.K. Singh** *for the Respondent.*

ORDER

Pramod Kumar, Accountant Member - The hearing of these appeals was concluded on 9th May 2018. However, during the course of finalizing the draft order, it was considered necessary to hear the parties again- this time with respect to a facet of Section 90(4) of the Income Tax Act, 1961. Accordingly, the matter was refixed for hearing on 14th June, 2018 and learned counsel for the assessee tax-deductor was heard on that aspect of the matter. With a view to give some time to enable the learned Departmental Representative to make a well considered response to thought provoking arguments of the learned counsel, the hearing continued on 15th June 2018 as well.

2. These two appeals pertain to the same assessee tax-deductor, involve a common issue spread over two assessment years, and were heard together. As a matter of convenience, therefore, we disposing of both the appeals by way of this consolidated order. The orders impugned are two separate but materially identical orders passed by the CIT(A), both dated 22nd January 2018, in the matter of tax withholding demands under section 201 r.w.s. 195 of the Income Tax Act, 1961, for the assessment years 2013-14 and 2014-15.

3. Grievance of the assessee tax-deductor, in substance, is that, on the facts and in the circumstances of the case, learned CIT(A) erred in confirming the action of the Assessing Officer in treating the payment aggregating to Rs 74,70,220 (AY 2013-14) and Rs. 2,97,45,710 (AY 2014-15), made to Teems Electric Inc USA, as liable to tax withholding under section 195 of the Act, and in raising resultant tax

withholding demands under section 201 r.w.s. 195, on account of non-deduction of tax at source from these payments made by the assessee tax-deductor. Learned representatives fairly agree to this proposition.

4. The issue in appeals lies in a rather narrow compass of material facts. The assessee tax-deductor has made certain payments to a US based entity by the name of Teems Electric Inc. ("TEI" or "the US entity", in short). These payments are made in consideration for the services rendered by TEI's personnel for installation and commissioning of certain equipment purchased by the assessee. The Assessing Officer was of the view, that these payments being in the nature of "payment for electrical labour and mechanical labour by the assessee, to Teems Electric Co Inc USA, is for services of engineers in India and is covered by the definition of fees for technical services under section 9(1)(vii) of the Income Tax Act, and the assessee was liable for withholding of tax". With respect to the treaty protection sought by the assessee under the Double Taxation Avoidance Agreement between India and USA [**Indo US tax treaty**, in short; **(1991) 187 ITR (Stat) 102**], the stand of the assessee was that there were four independent reasons for which the fees so paid by the Indian company was not taxable in India- (a) "the installation and commissioning activities were inextricably linked to the purchase of the equipment"; (b) "there was no transfer of technology" or "technology being made available"; and (c) "the entire installation charges were capitalized". As regards the installation and commissioning services being inextricably linked to the purchase of equipment, the Assessing Officer was of the view that the transaction of purchasing the equipment and availing the installation and commissioning services were not interdependent transactions in the sense that these were from different vendors, that these were separate commercial transactions and that the services rendered by TEI went well beyond the scope of installation and commissioning activity. It was thus concluded that "the services provided by Teems Electric Co Inc were not at all linked to the sale of the property". As regards the plea of the assessee that these services do not, in any event, satisfy the 'make available' test in Article 12(4)(b) of the India US Double Taxation Avoidance Agreement, the Assessing Officer rejected this plea on the ground that TEI "is the only source of obtaining such high degree of technical expertise that irrespective of *(who supplies the plant)* materials supply, only it has the desired level of expertise is installing and commissioning of a particular machine owned by the assessee" and "therefore, the services provided by Teems Electric Co Inc USA clearly fall within the clause 4(a) as well as clause 4(b) of Article 12 of the *(applicable)* tax treaty". It was in this backdrop that the assessee was treated as an assessee in default for not deducting tax at source from these payments, and, accordingly, a demand under section 201 r.w.s, 195 was raised on the assessee. Coming to the plea with respect to capitalization, the Assessing Officer was of the view that this plea is "irrelevant from the point of view of tax deductibility" as "the character of receipt has to be seen in the hands of the receiver and not the payer" and that "it may be that the services are being utilized in setting up of a plant but for the US entity, it is an income on the revenue account". The judicial precedents cited by the assessee were distinguished on facts. It was in this backdrop that the Assessing Officer held that the assessee was taxable in India in respect of the fees for technical services under section 9(1)(vii) read with Section 115A, and the applicable tax rate under section 115A at 10% being lesser than the tax rate at 15% envisaged by the Indo US tax treaty. The payment having already been made by the assessee without deducting tax at source, the Assessing Officer also directed the assessee to apply section 195A for grossing up of the tax liability. Aggrieved, assessee carried the matter in appeal before the CIT(A) but without any success. Quite to the contrary, there were some new issues which were taken up, for the first time, by the CIT(A) with respect to (a) tax residency certificate requirement under section 90(4); (b) joining the issue with respect to declaration of non-existence of the permanent establishment TEI; and (c) ascertaining the number of days of stay of employees and associates of TEI. Learned CIT(A), after her elaborate analysis, concluded (a) that, in the absence of a tax residency certificate having been furnished by the TEI and in view of the specific provisions of Section 90(4), the TEI cannot be granted protection of Indo US tax treaty; (b) that in the absence of

information about the days of stay of the TEI employees, and given the admitted facts on records, it is reasonable to conclude that the work continued in India for 16 weeks plus 30 days, and, therefore, the TEI had an installation PE under article 5(2)(k) of Indo US tax treaty; (c) that the installation and commissioning services cannot be said to be purchase of equipment, and thus covered by exclusion clause in Article 12(5)(a) of treaty, as the vendors for service and equipment are different; (d) that the services rendered by the TEI apparently included training of employees of the tax-deductor company as also development of documentation and that the work involved being highly technical, the services rendered by the TEI amount to making available knowledge, skill, technical know how and process, and, such, covered by the definition of 'fees for included services' under article 12(4); and (e) that since the TEI has a PE in India, the fees earned by TEI in India will be taxable in India on net basis and under section 44DA of the Act. The assessee tax-deductor was thus held to be liable to deduct tax at source. The action of the Assessing Officer was thus not only confirmed but further fortified by the learned CIT(A). The assessee is aggrieved and is in appeal before us.

5. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

6. The first question that we must address, at the threshold itself, is whether the TEI, i.e. the US entity to which the payments were made by the assessee company, was entitled to the benefits of Indo US tax treaty. There are two aspects to this fundamental question- first, whether the treaty protection could be declined to TEI simply on the short ground that the TEI was not able to, or did not, furnish the tax residency certificate under section 90(4) of the Act; second, whether TEI did not, on merits, satisfy the requirements of the Indo US tax treaty. As for the first aspect, the stand of the learned Departmental Representative is that non furnishing of the Tax Residency Certificate under section 90(4) itself, on a standalone basis, can be reason enough for declining the treaty protection. In support of this proposition, reliance is placed on the wordings of Section 90(4) which provide that "**An assessee, not being a resident, to whom an agreement referred to in sub-section (1) applies, shall not be entitled to claim any relief under such agreement unless a certificate of his being a resident in any country outside India or specified territory outside India, as the case maybe, is obtained by him from the Government of that country or specified territory**". It is thus contended that furnishing of the tax residency certificate is a condition precedent for invoking the treaty protection under section 90(2) of the Act. As we deal with this aspect of the matter and proceed to adjudicate upon the arguments of the parties on the same, let us take a quick look at the statutory provisions of Section 90 which deal with the double taxation avoidance agreements entered into by India. The statutory provision, as it stands now, is as follows:

Section 90- Agreement with foreign countries or specified territories.

(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 Gazette, 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.

(4) An assessee, not being a resident, to whom an agreement referred to in sub-section (1) applies, shall not be entitled to claim any relief under such agreement unless a certificate of his being a resident in any country outside India or specified territory outside India, as the case may be, is obtained by him from the Government of that country or specified territory.

(5) The assessee referred to in sub-section (4) shall also provide such other documents and information, as may be prescribed.

Explanation 1.—For the removal of doubts, it is hereby declared that the charge of tax in respect of a foreign company at a rate higher than the rate at which a domestic company is chargeable, shall not be regarded as less favourable charge or levy of tax in respect of such foreign company.

Explanation 2.—For the purposes of this section, "specified territory" means any area outside India which may be notified as such by the Central Government.

Explanation 3.– For the removal of doubts, it is hereby declared that where any term is used in any agreement entered into under sub-section (1) and not defined under the said agreement or the Act, but is assigned a meaning to it in the notification issued under sub-section (3) and the notification issued thereunder being in force, then, the meaning assigned to such term shall be deemed to have effect from the date on which the said agreement came into force.

"Explanation 4.—For the removal of doubts, it is hereby declared that where any term used in an agreement entered into under sub-section (1) is defined under the said agreement, the said term shall have the same meaning as assigned to it in the agreement; and where the term is not defined in the said agreement, but defined in the Act, it shall have the same meaning as assigned to it in the Act and if any, explanation given to it by the Central Government.".

7. A plain look at the above provisions would show that Section 90(2) is somewhat unique in providing an unqualified, what is, in India, often termed as, 'treaty override' in the sense that no matter what be the

provisions of the Income Tax Act, 1961, in respect of a person to whom an agreement entered into under section 90(1) applies, "**the provisions of this Act shall apply** *(only)* **to the extent they are more beneficial to that assessee"**. Going by the plain words of the statute, the provisions of the Act, in a situation covered by the tax treaty, cannot put the assessee to any greater burden than the burden placed by the provisions of applicable tax treaty. The only limitation placed on this unqualified, rather *almost* unqualified- post insertion of sub-section 2(A), is that "**(n)otwithstanding anything contained in sub-section (2), the provisions of Chapter X-A** *(dealing with the General Anti Avoidance Rules)* **of the Act shall apply to the assessee even if such provisions are not beneficial to him"**. Section 90(2A) is the only statutory provision in the Income Tax Act, 1961, which starts with a non-obstante clause vis-à-vis the provisions of Section 90(2), and, in that sense, it is the only rider to the treaty override provision set out in Section 90(2). That is the only rider to the superiority of tax treaty provisions vis-à-vis the provisions of the Indian Income Tax Act, 1961, is the exception carved out for the application of general anti avoidance rules set out in Chapter X-V.

8. In the light of our this analysis, when we turn to Section 90(4), as indeed other sub-sections of Section 90, we find that these provisions do not start with a obstante clause vis-à-vis Section 90(2) and, therefore, these sub-sections cannot be construed as limitation to, or rider to, somewhat unqualified treaty override stipulated in Section 90(2). Whatever interpretation one assigns to this sub-section, essentially the fundamental approach has to be that this sub-section will be applicable only when the same are more beneficial to the assessee vis-à-vis the provisions of the applicable tax treaty; that principle of treaty override, as set out in Section 90(2), remains unaffected by these provisions. As we hold so, we make it clear that whether the same position will also apply with respect to Explanations to Section 90 or not is still an open question, uninfluenced by these discussions, as Explanations to Section 90 may perhaps not have the same legal connotations as the sub-sections to Section 90. We leave it that for the time being.

9. Whatever may have been the intention of the lawmakers and whatever the words employed in Section 90(4) may *prima facie* suggest, the ground reality is that as the things stand now, this provision cannot be construed as a limitation to the superiority of treaty over the domestic law. It can only be pressed into service as a provision beneficial to the assessee. The manner in which it can be construed as a beneficial provision to the assessee is that once this provision is complied with in the sense that the assessee furnishes the tax residency certificate in the prescribed format, the Assessing Officer is denuded of the powers to requisition further details in support of the claim of the assessee for the related treaty benefits. Approving this approach, Hon'ble Punjab & Haryana High Court, in the case of ***Serco BPO Pvt Ltd* v. *Authority for Advance Ruling*** **[(2015) 379 ITR 256 (P&H)],** has observed as follows:

> *32. (Learned counsel's) reliance in this regard upon the proposed amendment to section 90 of the Act is well founded. It sets at rest the doubt, if any, in this regard.*
>
> *(A) Section 90(4) of the Act as is stood at the relevant time i.e. in respect of the assessment year 2010-11 reads as under:—*
>
> *"90 (4) An assessee, not being a resident, to whom an agreement referred to in sub-section (1) applies, shall not be entitled to claim any relief under such agreement unless [a certificate of his being a resident] in any country outside India or specified territory outside India, as the case may be, is obtained by him from the Government of that country or specified territory."*
>
> *(B) The Finance Bill, 2013 as introduced in the Lok Sabha on 28.02.2013 was to give effect to the financial proposals of the Central Government for the financial year 2013- 14. Clause 21 of the bill proposed the following amendment:—*
>
> *"21. In section 90 of the Income Tax Act,—*

(*a*) to (*b*)** ** **

(c) after sub-section (4) and before Explanation 1, the following sub-section shall be inserted, namely:—

(5) The certificate of being a resident in a country outside India or specified territory outside India, as the case may be, referred to in sub-section (4), shall be necessary but not a sufficient condition for claiming any relief under the agreement referred to therein."

The proposed sub-section (5) was not implemented. Parliament was obviously, therefore, conscious of the Circular No. 789 of 2000 and the effect thereof, namely, that the certificate of Residence issued by the Mauritian authorities would constitute sufficient evidence for accepting the status of residence as well as the beneficial ownership for applying the DTAC accordingly. Though an amendment in the Finance Bill was proposed which would affect the circular, the same was never implemented.

(C) The reason for Parliament not implementing the amendment is also evident from the clarification dated 01.03.2013 issued by the Finance Ministry specifically regarding Tax Residency Certificates. It is necessary to set out the entire circular as it is of vital importance. It establishes beyond doubt now that the Circular No. 789 was in full force and ought to have been given effect to. The circular reads as under:—

"Finance Ministry Clarification Regarding Tax Residency Certificate (TRC)

March 2, 2013

Concern has been expressed regarding the clause in the Finance Bill that amends section 90 of the Income-tax Act that deals with Double Taxation Avoidance Agreements. Sub-section (4) of section 90 was introduced last year by Finance Act, 2012. That sub-section requires an assessee to produce a Tax Residency Certificate (TRC) in order to claim the benefit under DTAA.

DTAAs recognize different kinds of income. The DTAAs stipulate that a resident of a contracting state will be entitled to the benefits of the DTAA.

In the explanatory memorandum to the Finance Act, 2012, it was stated that the Tax Residency Certificate containing prescribed particulars is a necessary but not sufficient condition for availing benefits of the DTAA. The same words are proposed to be introduced in the Income-tax Act as sub-section (5) of section 90. Hence, it will be clear that nothing new has been done this year which was not there already last year.

However, it has been pointed out that ***the language of the proposed sub-section (5) of section 90 could mean that the Tax Residency Certificate produced by a resident of a contracting state could be questioned by the Income Tax Authorities in India****. The government wishes to make it clear that that is not the intention of the proposed sub-section (5) of section 90.* ***The Tax Residency Certificate produced by a resident of a contracting state will be accepted as evidence that he is a resident of that contracting state and the Income Tax Authorities in India will not go behind the TRC and question his resident status.***

In the case of Mauritius, circular no. 789 dated 13.4.2000 continues to be in force, pending ongoing discussions between India and Mauritius.

However, since a concern has been expressed about the language of sub-section (5) of section 90, this concern will be addressed suitably when the Finance Bill is taken up for consideration." (Emphasis supplied)

33. Sub-section (4) merely requires a certificate of being resident. The newly added sub-section (5) requires the person to also provide such other documents and information as may be prescribed. Nothing has been prescribed to date.

34. The entire sequence of events namely the Finance Bill, 2013, the clarification issued by the Finance Ministry regarding the Tax Residency Certificate dated 01.03.2013 and the Finance Act, 2013 ***establish beyond doubt that the Residence Certificate issued by the Mauritius authorities must be accepted provided of course it is established that it has been issued by the appropriate Mauritius Authorities****. As we mentioned earlier it is not disputed that the Residence Certificate relied upon by Blackstone Mauritius and Barclays were issued by the Mauritius authorities.*

[Emphasis, by underlining, supplied by us]

10. The judicial approval was, therefore, to the use of Section 90(4) in favour of the assessee in the manner set out above. In view of the provisions of Section 90(2), there cannot be any controversy on this aspect. That is qualitatively much different from the stand of the CIT(A) called into question before us. Our research did not indicate any judicial precedent which has approved the interpretation in the manner sought to be canvassed before us i.e. Section 90(4) being treated as a limitation to the treaty superiority contemplated under section 90(2), and that issue is an open issue as on now. In the light of this position, and in the light of our foregoing analysis which leads us to the conclusion that Section 90(4), in the absence of a non-obstante clause, cannot be read as a limitation to the treaty superiority under Section 90(2), we are of the considered view that an eligible assessee cannot be declined the treaty protection under section 90(2) on the ground that the said assessee has not been able to furnish a Tax Residency Certificate in the prescribed form. To this extent, the approach of learned CIT(A) is clearly erroneous.

11. That, however, is not the end of the matter.

12. As learned Departmental Representative rightly suggests, even if in a rather simplistic way, irrespective of whether Section 90(4) applies or not, there has to be reasonable evidence about entitlement of the US entity to the benefits of the Indo US tax treaty. He submits that just a US address cannot *per se* be sufficient to claim the protection of Indo US tax treaty, and that once the issue about treaty entitlement has been raised by the learned CIT(A), it has to be taken to a logical conclusion. We see merits in this plea. In other words, even if we are to hold that Section 90(4) is inapplicable, we have to, on the peculiar facts of this case, give a finding whether the US entity was entitled to the treaty protection, and that would only be possible when there is some material to come to the conclusion that the US entity was required to be treated as a resident of United States under the provisions of the Indo US tax treaty. Having held that an eligible assessee cannot be declined treaty protection under section 90(2) *simplicitor* on the ground that he has not complied with the provisions of Section 90(4), it is also important to bear in mind the fact that *de hors* the statutory provision under Section 90(4), the assessee has to satisfy his eligibility for treaty protection nevertheless and the onus of satisfying the same by any other mode, i.e. other than a TRC, appears to be much more demanding than furnishing of a TRC. To be entitled for Indo US tax treaty benefits in India, a foreign enterprise has to establish that it is a resident of the other contracting state, i.e. the United States. While on this issue, it will be useful to take a look at Article 4(1) of the Indo US tax treaty, which provides as follows:

ARTICLE 4-RESIDENCE

1. For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, citizenship, place of management, place of incorporation, or any other criterion of a similar nature, provided, however, that

(a) *this term does not include any person who is liable to tax in that State in respect only of income from sources in that State; and*

(b) *in the case of income derived or paid by a partnership, estate, or trust, this term applies only to the extent that the income derived by such partnership, estate, or trust is subject to tax in that State as the income of a resident, either in its hands or in the hands of its partners or beneficiaries.*

13. Article 4(1) thus provides that, as a preliminary requirement and in order to be treated as 'resident of a contracting state', a taxpayer has to demonstrate that he is liable to tax in that jurisdiction by the reason of domicile, residence, citizenship, place of management, place of incorporation or any other criterion of similar nature. The residuary clause i.e. "any other criterion of similar nature", as has been judicially noted in the case of ***DCIT* v. *General Electric Co plc & Ors* [(2001) 71 TTJ 973 (Cal)]**, should be understood to "mean any locality-related attachment that attracts residence-type taxation". Unless it is established that the assessee is able to satisfy the above preliminary requirement for being treated as resident of a contracting state (i.e. USA in this case), the assessee cannot be held to be entitled for the treaty protection in the other contracting state (i.e. India in this case). As an additional requirement under Article 4(1)(a), definition of the expression 'resident of contracting state' "does not include any person who is liable to tax in that State in respect only of income from sources in that State". In other words, the taxability in USA has to be not only of the income sourced in the United States, but the global income of the assessee. The onus is on the assessee to give sufficient and reasonable evidence of satisfying the requirements of Article 4(1)- particularly when the same is called into question. These requirements are far more onerous than furnishing of TRC; the latter would have been a much simpler a course of action. Be that as it may, there is no, and there cannot be, any escape from substantiating the status of the US entity as a person resident of the United States, in terms of Article 4(1) of the Indo US tax treaty, in order to claim the benefits of the said tax treaty. Let us, in this light, turn to the evidence, in support of his eligibility for Indo US tax treaty protection, furnished by the US entity. So far as the assessment stage is concerned, the assessee applicant did not furnish any evidence in support of the treaty entitlements of the US entity but then, in all fairness, the Assessing Officer did not doubt the treaty entitlements either. Therefore, once we hold that Section 90(4) does not act as a bar for treaty entitlement in the sense it can not be seen as a limitation of superiority of treaty provisions vis-à-vis the domestic law provisions, as we have indeed held earlier this order, the mere non-furnishing of TRC cannot *per se* be treated as a trigger to disentitlement to the treaty benefits. At the first appellate stage, however, learned CIT(A) did specifically ask for the TRC and all that the assessee furnished was a form W 9 which is meant for use in the context of domestic tax withholding requirements in the United States. It has been rejected for the reason that it was issued on 9th October 2017 and it does not disclose the residential status of the US entity in the relevant period. However, we have noted that the assessee was asked, for the first time, to file TRC on 11th December 2017 and there was hardly enough time between this date of requisition and the date of passing the impugned order, i.e. 22nd January 2018, so as to give an effective opportunity to the assessee to comply with this requisition. Whether the conduct of the assessee, therefore, can be faulted or not, the requirements for establishing treaty entitlements under article 4(1) are to be satisfied established nevertheless. Let us, therefore, examine whether form W9, as submitted by the assessee, can lead us to the conclusion that the conditions laid down in Article 4(1) are satisfied.

14. The purpose of form W9, which is given under US Internal Revenue Code, is for providing the correct TIN to the person who is required to file an information return with the IRS. The information contained on the US IRS website points out that "**An individual or entity (Form W-9 requester) who is required to file an information return with the IRS must obtain your correct taxpayer identification number (TIN) which may be your social security number (SSN), individual taxpayer identification number (ITIN), adoption taxpayer identification number (ATIN), or employer**

identification number (EIN), to report on an information return the amount paid to you, or other amount reportable on an information return". In plain words, it is merely a declaration so as to provide inputs to the tax-deductor for fulfilling reporting obligations to the US IRS. It has no relevance in the present context. It is thus important to appreciate that even from a US tax law and practice perspective, form W 9 is wholly irrelevant in respect of tax withholdings outside the United States. We have noted that form W 9 is merely a declaration by the US based entity, and, in our considered view, it cannot be treated as a certification by any authority. A declaration by the US entity, without any material to substantiate the basic facts set out in the declaration, cannot be accepted as legally sustainable foundation for a finding of fact.

15. Even on the merits of the contents of form W9, the appellant does not get any relief either. We have noted that form W 9 does state that the US entity is a "C corporation"- an expression which is, in US taxation context, used to distinguish this type of company from transparent entities, as "its profits are taxed separately from its owners under subchapter C of the Internal Revenue Code", and but then what it does not state is whether the said company is fiscally domiciled in the United States or not. Similarly, the statement made in W9 is that it is not a single member LLC or S corporation so as to have a pass-through status could only be relevant when it is a company fiscally domiciled, for tax purposes, in United States. In any event, W9 is just a statement made by the US entity and it is not supported by any evidences in support of the contents of form W9. In any event, as learned CIT(A) rightly points out, the information pertains to a later year and there is nothing to even indicate, leave aside establish, that this will hold good for the relevant period as well. a change in those facts for different years. Keeping Section 90(4) aside for a minute, even on merits, there is nothing to establish the treaty entitlement of the US entity.

16. It is difficult to comprehend the conceptual justification for litigation on such a procedural issue. The entire controversy about 90(4) being a limitation to Section 90(2), from the point of view of reasonableness, is a non-issue. Whether Section 90(4) is a legally valid limitation on Section 90(2) or not, a TRC can be obtained by the US entity, as the public information on US IRS website indicates, for a modest user fee of US $ 85 and a statutory form being filed by the US entity. In our humble understanding, whatever its worth, TRC is certainly a far easier mode of discharging the onus about establishing residential status, under a tax treaty, of a foreign enterprise. Yet, we have a litigation including this facet as well.

17. Learned counsel has thus succeeded in his legal submissions but, for all practical purposes, this success is rather hollow, on the facts of this case, inasmuch as it does not bring any relief, as on this stage, to the assessee tax-deductor. Even when we keep the requirements of Section 90(4) aside, the eligibility of TEI for Indo US tax treaty entitlement is not established, and, therefore, all the erudite arguments of distinguished senior counsel, on the scope of various provisions of Indo US tax treaty are, at this stage, purely academic and wholly infructuous.

18. In all fairness, however, we must also remain alive to the fact that at no stage was the assessee asked to submit evidences in support of his residential status so as to satisfy the conditions laid down under article 4(1). The Assessing Officer did not deal with this aspect of the matter at all, and simply proceeded to apply law on the assumption that the US entity was entitled to the benefits of the Indo US tax treaty, and while learned CIT(A) was indeed conscientious to take note of this legal requirement, she only asked the assessee to produce a tax residency certificate under section 90(4) which, as we have held earlier in this order, does not dilute the superiority of the treaty law over the domestic law. Even this requisition was made shortly before the hearing was concluded by the learned CIT(A). On these facts, we are of the considered view that the opportunity granted, on this aspect, by the learned CIT(A) to the assessee was less than reasonable and less than fair. We have also noted that there appears to be some communication gap between the CIT(A) and the assessee on the number of days on which the

representatives of the US entity worked in India, and that aspect has a vital bearing on determination of question as to whether the US entity had a PE in India or not. Learned senior counsel's submission is that there are certain other clear factual and legal mistakes, with respect to application of Indo US tax treaty provisions, which, on the face of it, are so fundamental in nature that these mistakes may indeed end up vitiating the conclusions arrived at by the learned CIT(A), but, for the reasons we will set out in a short while, it will not really be appropriate for us to deal with these alleged mistakes at this stage.

19. In the light of these discussions, we are of the considered view that the matter should be remitted to the file of the CIT(A) for fresh adjudication, *inter alia,* after (i) giving the assessee a fresh opportunity of furnishing evidences not limited to, but including, the tax residency certificate under section 90(4), in support of US entity's entitlement to the benefits of Indo US tax treaty benefits; (ii) taking into account the information furnished by the assessee with respect to the time spent by the representatives of the US entity and all such other information and submissions as may be filed by the assessee; and (iii) giving the assessee yet another opportunity of hearing while giving effect to these directions.

20. As the matter is being remitted to the file of the CIT(A) for fresh adjudication, *inter alia*, on the fundamental aspect of treaty entitlement, it would not be appropriate for us to deal with other questions with respect to the treaty provisions which seem to academic as on this stage. We cannot address ourselves to such academic issues. However, now that the matter is going back to the CIT(A) for fresh adjudication in the terms indicated above, we also deem it proper to add that all the issues will remain open for fresh consideration by the CIT(A) and the assessee is at liberty to raise all such issues as he deem fit and the CIT(A) will dispose of the same, in accordance with the law, by way of a speaking order and after giving assessee a reasonable opportunity of hearing to the parties.

21. In the result, the appeals are allowed for statistical purposes in the terms indicated above.

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