MOOT PROPOSITION

DRAFT PROBLEM

The assessee, M/s. Vulcantech BPO India Private Limited, has filed an appeal before the Hon'ble High Court under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal ("Tribunal") passed in the case of M/s. Vulcantech BPO India Private Limited Vs ACIT for the Assessment Year 2014-15. The assessee raised the following substantial questions of law which have been admitted by the Hon'ble High Court and fixed for final hearing:

1. *Whether on the facts and in the circumstances of the case, the Tribunal was right in law in upholding the disallowance of assessee's payments to Markiv Carras of Markiv Legal, Cyprus u/S.40(a)(i) r.w. S.94A r.w. Notification 86/2013 overriding the provisions of S.90 along with Article 15 of the India-Cyprus DTAA?*

In relation to the matter at hand, the following Annexures form part of the record:

Annexure A: The impugned order of the Tribunal

Annexure B: Grounds of appeal filed before the Tribunal

Annexure C: Final Assessment Order

Annexure D: Directions of DRP

Annexure E: Objections before DRP

Annexure F: Draft Assessment Order

Annexure A

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH

BEFORE SHRI F.D.LEGELLO, JUDICIAL MEMBER AND

SHRI ANTHONY VARDON, ACCOUNTANT MEMBER

ITA No. 1027/Mds/2015

Assessment Year : 2014-15

M/s Vulcantech BPO India Private Limited. ---------- Appellant

- Vs -

The Assistant Commissioner of Income-Tax ---------- Respondent

Appellant by : Shri. Aziz Alam

Respondent by : Shri. Raman Gopalakrishnan

Date of Hearing : 1st December, 2016

Date of Pronouncement : 1st December, 2016

ORDER

PER ANTHONY VARDON, ACCOUNTANT MEMBER

1. This appeal by the assessee is directed against the order of assessment passed by the Income Tax Officer, Company Circle – II(4) u/s 143(3) r.w.s 144C(13) of the Act, dt 24.10.2016 in pursuance of the directions issued by the Dispute Resolution Panel (DRP in short), vide its order dt 13-10-2016 passed u/s 144C(5) r.w 144C(8) of the Act.

2. The facts of the case, in brief, are as under:

2.1 The assessee filed its Return of Income (ROI) electronically, declaring 'Nil' income for the Assessment Year (AY) 2014-15. The ROI was processed u/s 143(1) of the Income Tax Act (the Act). The case was selected for scrutiny and notice u/s 143(2) of the Act was issued to the assessee.

2.2 The AO in the course of scrutiny made a disallowance u/s 40(a)(i) r.w. S.94A r.w Notification No.86/2013 *(Rule 21AC and Form No. 10FC)* of Rs. 91,32,564/-

2.3 The assessee filed its objections before the Dispute Resolution Panel (DRP) on 7-4-2016. The DRP heard the assessee and passed an order on 13-10-2016 confirming the disallowances made by the AO and thereby rejecting the objections raised by the assessee. In consequence, the ITO passed the final Order of Assessment on 24-10-2016 u/s 143(3) r.w.s 144C(13) of the Act.

3. Aggrieved by the above said order of assessment dt 24-10-2016, the assessee is on appeal before us raising various grounds. Before us, the assessee has reiterated its submissions made before the lower authorities

4. We note that the AO has passed a very detailed, speaking order as to why the disallowances should be upheld. We neither find need to repeat the same points nor interfere with the AO's findings, which have been confirmed by the DRP.

5. Hence, we are unable to accept the contention of the assessee and dismiss the grounds raised by the assessee.

6. The assessee's appeal is thus dismissed.

Order pronounced in the open court on 1st day of December, 2016

Sd/- Sd/-

Accountant Member Judicial Member

ANNEXURE- B

Vulcantech BPO India Pvt Ltd

Assessment Year 2014-15 (PAN : AACBD4392M)

APPEAL BEFORE THE INCOME-TAX APPELLATE TRIBUNAL AGAINST THE ORDER PASSED u/S. 143(3) r.w. S.144C(13)

GROUNDS OF APPEAL

A. Disallowance u/s 40(a)(i) r.w. S.94A r.w Notification 86/2013 of Rs. 91,32,564/-

1. The DRP/ITO erred in applying the provisions of S.40(a)(i) r.w. S.94A r.w. Notification No.86/2013 *(Rule 21AC and Form No. 10FC)* to the instant case

2. The DRP/ITO erred in not applying S.90(2) of the Act which holds that provisions of Act are applicable to the extent that they are more beneficial to the taxpayer and hence Article 15 (Independent Personal Services) of India-Cyprus DTAA which prescribe no tax withholding required in the instant case, thus being more beneficial, is solely applicable to the taxpayer

3. The DRP/ITO failed to appreciate that application of DTAA Articles cannot be unilaterally amended by the contracting country, especially by Section S.94A which is not a charging section under the Act.

B. The Appellant prays leave of the Hon'ble ITAT for elaborating the aforesaid grounds and craves leave to adduce additional grounds at the time of hearing.

Director
For Vulcantech BPO India Pvt Ltd
Dated: 2nd November 2016

Annexure C

Income Tax Department

1	Name of the Assessee	M/s.Vulcantech BPO India Private Limited
2	PAN/G.I.R. No.	AACBD4392M
3	Circle	Company Circle – II(4)
4	Status (Domestic/Public/Private, If Applicable)	Company
5	Assessment Year	2014-15
6	Whether Resident/Resident But Not Ordinarily Resident/Non-Resident	Resident
7	Method of Accounting	Mercantile
8	Previous Year	2013-14
9	Nature of Business	ITES
10	Date of Order	24 October, 2016
11	Section under which assessment order is passed	143(3) r.w.s 144C(13)

FINAL ASSESSMENT ORDER

The assessee is a wholly owned subsidiary of Vulcantech BPO Inc, USA. The assessee is engaged in rendering data conversion services to its ultimate parent company Vulcantech BPO Inc, USA in the area of forms processing, E-publishing, support systems and software services. The assessee company had e-filed its Return of Income for the AY 2014-15 declaring 'Nil' income. The Return was processed under sub-section (1) of section 143 of the Income Tax Act, 1961.

The case was selected for scrutiny and notice u/s 143(2) of the Act was issued to the assessee. Subsequently, the case was assigned by the Commissioner of Income Tax to the Income Tax Officer, Company Range II, for completion of assessment u/s 143(3) of the Act. The ITO, Company Range-II issued a Draft Assessment Order u/s 143(3) r.w.s 144C dt 31-3-2016, incorporating one disallowance.

The assessee preferred an appeal before the Dispute Resolution Panel (DRP) on 7-4-2016. The DRP passed an order u/s 144C(5) r.w 144C(8) on 13-10-2016 upholding the order of the AO Hence, as per the directions of the DRP vide its Order dt 13-10-2016 the order of the ITO is confirmed.

Income Tax Officer

Company Range – II(4)

Copy to:

Assessee

Annexure - D

Income Tax Department
Dispute Resolution Panel (DRP)

Proceedings to issue directions under sub-section 5 of section 144C read with sub-section 8 of Section 144C the Income Tax Act 1961		
1	F. No. DRP/CHE/98/2014-15	Date of Directions: 13.10.2016
2Name of Assessee	M/s.Vulcantech BPO India Private Limited	
3	PAN	AACBD4392M
4	Assessment Year	2014-15
5	Date of Filing of Objections by the Assessee before the DRP	7-4-2016
6	Date of Direction	13-10-2016
7	Section & Sub-section under which the directions are given	144C(5) r.w 144C(8)

The assessee company had e-filed Return of Income for AY 2014-15 declaring 'Nil' income. The AO passed a Draft Assessment Order on 31.3.2016 disallowing Rs. 91,32,564/- u/s 40(a)(i) r.w S.94A r.w Notification 86/2013 *(Rule 21AC and Form No. 10FC)*. The assessee filed its objections before the Draft Resolution Panel (DRP) on 7.4.2016 and subsequently, notice was issued u/S.144C(11). The DRP has heard the assessee.

Panel : This Panel does not find anything new which has not been considered by the detailed speaking order of the AO. The AO has considered threadbare all important aspects and then only taken the decision to disallow under S.40(a)(i).

Furthermore it is pointed out wrt S.40(a)(i) disallowance, subsequent to the order of the AO, on 12th April 2016, the Hon'ble Madras High Court in the case of a Writ Petition ***(T.Rajkumar, K.Dhanakumar, T.K.Dhanashekar rep. By PoA holder Mr.P.Sivakumar***

vs UoI, CBDT, ITO in WP Nos.17241 to 17243 & 17407 to 17412 of 2015 and all connected pending MPs via order dated 12/4/2016) filed challenging the constitutionality of S.94A has elaborately discussed interplay of S.94A and S.90 and held that S.94A is valid. The aforesaid judgment clearly supports the stance of the AO in disallowance u/s 40(a)(i) r.w. S.94A. This Panel therefore finds that all the objections raised by the assessee and confirms the order of the AO in toto.

Sd/-	Sd/-	Sd/-
DIT (Int Taxation) Member, DRP	DIT (Int Taxation) Member, DRP	CIT Member, DRP

Copy Forwarded to:

1. **ITO**
2. **Assessee**
3. **The Guard File**

Annexure - E

Vulcantech BPO India Private Limited

Assessment Year 2014-15

Summary of Objections before the DRP

A. Disallowance u/s 40(a)(i) r.w. S.94A r.w Notification 86/2013 of Rs. 91,32,564/-

1. The ITO erred in applying the provisions of S.40(a)(i) r.w. S.94A r.w. Notification No.86/2013 *(Rule 21AC and Form No. 10FC)* to the instant case

2. The ITO erred in not applying S.90(2) of the Act which holds that provisions of Act are applicable to the extent that they are more beneficial to the taxpayer and hence Article 15 (Independent Personal Services) of India-Cyprus DTAA which prescribe no tax withholding required in the instant case, thus being more beneficial, is solely applicable to the taxpayer

3. The ITO failed to appreciate that application of DTAA Articles cannot be unilaterally amended by the contracting country, especially by S.94A which is not a charging section under the Act.

B. The Appellant prays leave of the Hon'ble Dispute Resolution Panel for elaborating the aforesaid grounds and craves leave to adduce additional grounds at the time of hearing.

Authorised Signatory
For Vulcantech BPO India Pvt Ltd
Dated: 7.4.2016

Annexure - F

Income Tax Department

1	Name of the assessee	M/s.Vulcantech BPO India Private Limited
2	PAN/G.I.R. No.	AACBD4392M
3	Circle	Company Circle – II(4)
4	Status (Domestic/Public/ Private, If Applicable)	Company
5	Assessment Year	2014-15
6	Whether Resident/Resident But Not Ordinarily Resident/Non-Resident	Resident
7	Method of Accounting	Mercantile
8	Previous Year	2013-14
9	Nature of Business	ITES
10	Date of Order	31.03.2016
11	Section under which Assessment Order is passed	143(3) r.w.s 144C

DRAFT ASSESSMENT ORDER

The assessee is a wholly owned subsidiary of M/s. Vulcantech BPO Inc, USA. The assessee is engaged in rendering data conversion services in the area of forms processing.

The assessee company had e-filed its Return of Income for the Assessment Year 2014-15 declaring 'Nil' income. The Return was processed under sub-section (1) of section 143 of the Income Tax Act, 1961.

The case was selected for scrutiny and notice u/s 143(2) of the Act was issued to the assessee.

Subsequently, the case was assigned by the Commissioner of Income Tax to the Income Tax Officer, Company Range II, for completion of assessment u/s 143(3) of the Act.

In response to the notices issued, Sri. Ramachandran, CFO and Sri. Venkatraman, Dy. Sr. Manager (Fin) appeared from time to time on various dates. He filed the Power of Attorney to appear before the Income-Tax Authorities. Details relevant to the Return of Income were called for from the assessee and were filed. The case was discussed with the assessee's representative and the scrutiny assessment is completed as under:

Disallowance u/s 40(a)(i) r.w. S.94A on payments to Cyprus company:

During the course of assessment proceedings, it was noticed that assessee has claimed expenditure of Rs.91,32,564/- being the amount paid to non-residents for payments made towards legal fees paid to Mr. Markiv Carras, Partner, Markiv Legal in Nicosia.

The assessee was asked to furnish details and break-up of the same and has submitted a brief write up on the legal services rendered by partner of said law firm and the invoices raised therein in his name. The services were rendered via email in the form of written opinions on issues relating to acquisition of a company the assessee

intended to make in that country. More importantly, it is seen that no TDS was withheld on the payments made to the assessee.

On questioning the assessee regarding the failure to withhold tax on said payments; the assessee has quoted the India-Cyprus DTAA in existence at the time of payments and stated as follows:

“””

We submit to your good self that the payments made to a lawyer in Cyprus squarely fall under Article 15 of the India-Cyprus DTAA which reads as follows:

“ARTICLE 15

INDEPENDENT PERSONAL SERVICES

1. Income derived by a resident of a Contracting State in respect of professional services or other independent activities of a similar character shall be taxable only in that State except in the following circumstances when such income may also be taxed in the other Contracting State :

(a) if he has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities; in that case, only so much of the income as is attributable to that fixed base may be taxed in that other Contracting State; or

(b) if his stay in the other Contracting State is for a period or periods amounting to or exceeding in the aggregate 183 days in the relevant fiscal year; in that case only so much of the income as is derived from his activities performed in that other State may be taxed in that other State.

2. The term "professional services" includes especially independent scientific, literary, artistic, educational or teaching activities, as well

as the independent activities of physicians, surgeons, lawyers, engineers, architects, dentists and accountants."

We submit that said lawyer, Mr.Markiv Carras, did not visit India for rendering his opinion ie did not have a fixed base in India and that the 'professional services' envisaged in the section clearly include lawyers. Hence, there is no question of tax under the India-Cyprus DTAA read with Section 90(2) of the Income Tax Act which states as follows:

"S.90(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."***

""""

The assessee was asked why the disallowance cannot be made u/s 201(1) r.w. S.94A wherein S.94A has been inserted through Finance Act 2011 to bring into tax bracket "notified jurisdictional areas" (NJA's) and a Notification dated 1-Nov-2013 was issued notifying Cyprus as one of the NJA's.

The assessee's replied is reproduced herein under

""""

We rely on the Supreme Court decision in ***Union of India Vs. Azadi Bachao Andolan [2004 (10) SCC 1]****, wherein it was held that Section 90 of the Income Tax Act is specifically intended to enable and empower the Central Government to issue a notification for implementation of the terms of a Double Taxation Avoidance Agreement and that when it happens, the provisions of such an Agreement would operate*

*Furthermore, we rely also on **CIT vs. P.V.A.L.Kulandagan Chettiar (2004 (6) SCC 235)** In paragraphs 6 and 7 of the said decision, the Supreme Court pointed out that the traditional view with regard to the concept of double taxation, underwent a considerable change, in the light of Section 90 of the Income Tax Act. In paragraph 8, the Court held that the provisions of Sections 4 and 5 of the Act are subject to the provisions of an agreement entered into between the Central Government and the Government of a foreign country for avoidance of double taxation, as envisaged under Section 90. The Court further held that if a tax liability is imposed by the Act, the agreement may be resorted to either for reducing the tax liability or for altogether avoiding the liability.*

We would also like to submit that S.206AA of the IT Act also has a non-obstante clause and seeks to override treaty benefits and various decisions of the Tribunal including but not restricted to DCIT vs. Serum Institute (ITA No.792/PN/2013) in which the Tribunal held:

> *"Therefore, in view of the aforesaid schematic interpretation of the Act, section 206AA of the Act cannot be understood to override the charging sections 4 and 5 of the Act. Thus, where section 90(2) of the Act provides that DTAAs override domestic law in cases where the provisions of DTAAs are more beneficial to the assessee and the same also overrides the charging sections 4 and 5 of the Act and hence, also section 206AA of the Act."*

We humbly submit that the benefits under the Treaty are decided bilaterally between two countries ie in this case India and Cyprus and cannot be unilaterally subject to tax.

Without prejudice to the above, we would also like to point out that the payments in question are clearly not in the nature of tax planning, tax avoidance or any capital-gains tax reduction scheme or any misuse of treaty

benefits but rather mere payment for legal fees and should not be treated under the ambit of tax avoidance for which S.94A has been introduced.

We therefore submit the India-Cyprus DTAA Article 15 squarely applies in the instant case and tax is not exigible on payments made by assessee to the foreign lawyer.

“"”

The assessee's contentions are thoroughly considered and rejected for the reasons recorded hereinunder.

The provisions of S.94A are as follows:

“”"Section - 94A, Income-tax Act, 1961-2016

Special measures in respect of transactions with persons located in notified jurisdictional area.

94A. (1) The Central Government may, having regard to the lack of effective exchange of information with any country or territory outside India, specify by notification in the Official Gazette such country or territory as a notified jurisdictional area in relation to transactions entered into by any assessee.

*(2) **Notwithstanding anything to the contrary contained in this Act**, if an assessee enters into a transaction where one of the parties to the transaction is a person located in a notified jurisdictional area, then—*

(i) all the parties to the transaction shall be deemed to be associated enterprises within the meaning of section 92A;

(ii) any transaction in the nature of purchase, sale or lease of tangible or intangible property or provision of service or lending or borrowing money or any other transaction having a bearing on the profits, income, losses or assets of the assessee including a mutual agreement or arrangement for allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided by or to the assessee shall be deemed to be an international transaction within the meaning of section 92B,

and the provisions of sections 92, 92A, 92B, 92C except the second proviso to sub-section (2), 92CA, 92CB, 92D, 92E and 92F shall apply accordingly.

(3) ***Notwithstanding anything to the contrary contained in this Act****, no deduction,—*

(a) in respect of any payment made to any financial institution located in a notified jurisdictional area shall be allowed under this Act, unless the assessee furnishes an authorisation in the prescribed form authorising the Board or any other income-tax authority acting on its behalf to seek relevant information from the said financial institution on behalf of such assessee; and

(b) in respect of any other expenditure or allowance (including depreciation) arising from the transaction with a person located in a notified jurisdictional area shall be allowed under any other provision of this Act, unless the assessee maintains such other documents and furnishes such information as may be prescribed, in this behalf.

(4) ***Notwithstanding anything to the contrary contained in this Act****, where, in any previous year, the assessee has received or credited any sum from any person located in a notified jurisdictional area and the assessee does not offer any explanation about the source of the said sum in the hands of such person or in the hands of the beneficial owner (if such person is not the beneficial owner of the said sum) or the explanation offered by the assessee, in the opinion of the Assessing Officer, is not satisfactory, then, such sum shall be deemed to be the income of the assessee for that previous year.*

(5) ***Notwithstanding anything contained in any other provisions of this Act, where any person located in a notified jurisdictional area is entitled to receive any sum or income or amount on which tax is deductible under Chapter XVII-B, the tax shall be deducted at the highest of the following rates, namely:—***

(a) at the rate or rates in force;

(b) at the rate specified in the relevant provisions of this Act;

(c) at the rate of thirty per cent.

(6) In this section,—

(i) "person located in a notified jurisdictional area" shall include,—

(a) a person who is resident of the notified jurisdictional area;

(b) a person, not being an individual, which is established in the notified jurisdictional area; or

(c) a permanent establishment of a person not falling in sub-clause (a) or sub-clause (b), in the notified jurisdictional area;

(ii) "permanent establishment" shall have the same meaning as defined in clause (iiia) of section 92F;

(iii) "transaction" shall have the same meaning as defined in clause (v) of section 92F.""" (emphasis supplied)

The Central Govt. has further **notified (vide Notification No.86/2013) the country of Cyprus as a notified jurisdictional area (NJA)** under the above section on 01-November-2013 in the following manner:

"

Press Information Bureau

Government of India

Ministry of Finance

01-November-2013 17:51 IST

Cyprus Notified as a notified Jurisdictional Area Under Section 94a of the Income-Tax Act,1961 ; All Parties to the Transaction with a Person in Cyprus shall be Treated as Associated Enterprises and the Transaction shall be Treated as an International Transaction Resulting in Application of Transfer-Pricing Regulations Including Maintenance of Documentations

Section 94A was introduced in the Income-tax Act, 1961, through the Finance Act, 2011, in respect of transactions with persons located in notified jurisdictional area as an anti-avoidance measure. As per section 94A, the Central Government may, having regard to the lack of effective exchange of information with any country or territory outside India, specify the said

country or territory as a notified jurisdictional area in relation to transactions entered into by any assessee. The rules under section 94A were notified as Income-tax (8th Amendment) Rule, 2013, through S.O. 1856 (E) dated 26th June, 2013, by inserting Rule 21AC and Form 10FC in the Income-tax Rule, 1962.

India and Cyprus have entered into an agreement for avoidance of double taxation of income and prevention of fiscal evasion which is in force since 21st December, 1994. Both the Contracting States under this agreement have a legal obligation to exchange such information as is necessary for carrying out the provisions of the agreement or of domestic laws of the Contracting States, in particular for the prevention of fraud or evasion of taxes.

Since Cyprus has not been providing the information requested by the Indian tax authorities under the exchange of information provisions of the agreement, it has been decided to notify Cyprus as a notified jurisdictional area under section 94A of the Income-tax Act, 1961 through Notification No. 86/2013 dated 1st November, 2013 published in Official Gazette through SO 4625 GI/13.

The implications of such a Notification are summarized as under:

- *If an assessee enters into a transaction with a person in Cyprus, then all the parties to the transaction shall be treated as associated enterprises and the transaction shall be treated as an international transaction resulting in application of transfer-pricing regulations including maintenance of documentations [Section 94A(2)].*

- *No deduction in respect of any payment made to any financial institution in Cyprus shall be allowed unless the assessee furnishes an authorization allowing for seeking relevant information from the said financial institution [Section 94A(3)(a) read with Rule 21AC and Form 10FC].*

- *No deduction in respect of any other expenditure or allowance arising from the transaction with a person located in Cyprus shall be allowed unless the assessee maintains and furnishes the prescribed information [Section 94A(3)(b) read with Rule 21AC].*

- *If any sum is received from a person located in Cyprus, then the onus is on the assessee to satisfactorily explain the source of such money in the hands of such person or in the hands of the beneficial owner, and in case of his failure to do so, the amount shall be deemed to be the income of the assessee [Section 94A(4)].*

- ***Any payment made to a person located in Cyprus shall be liable for withholding tax at 30 per cent or a rate prescribed in Act, whichever is higher [Section 94A(5)].***

Reading the provisions of the Act as well as the Notification, the following points are to be considered in the instant case:

First of all, it is observed that the assessee did not maintain the documents as prescribed under Rule 21AC and Form 10FC for the purposes of Sec. 94A. Therefore, at the outset, the entire expenditure is liable to be disallowed. Further, the assessee has not deducted tax at source as prescribed u/S 94A(5) and Sec. 40(a)(i).

Secondly, the S.94A clearly contain a non-obstante clause making it abundantly clear that it overrides the other provisions of the Act including S.90. When there is a specific provision inserted by the legislature, that too later in time, it has to be applied and hence S.94A is clearly applicable in the instant case.Thirdly, S.90 which the assessee relies on does not have a non-obstante clause *(ie on the lines of "Notwithstanding anything contained in other provisions of this Act")* and clearly cannot be said to be overriding S.94AFourthly, no question arose directly either in ***Azadi Bachao Andolan*** (*supra*) or in ***Kulandagan Chettiar*** cases (*supra*) as to whether or not the Parliament has the power to make a law in respect of a matter covered by a Treaty. Therefore, the observations found in these two decisions, to the

effect that the provisions of the Treaty will have effect even if they are in conflict with the provisions of the statute, cannot be stretched too far to conclude that the Parliament does not have the power to make a law in respect of a matter covered by a Treaty.Further, I refer to the landmark cases of ***Jolly George Varghese Vs. The Bank of Cochin [AIR 1980 SC 470]***, wherein the Supreme Court held that the executive power of the Government of India to enter into international Treaties does not mean that international law, ipso facto, is enforceable upon ratification. The Supreme Court observed that the Indian Constitution followed the 'dualistic' doctrine with respect to international law. Consequently, the Court held that international Treaties do not automatically form part of international law, unless incorporated into the legal system by a legislation made by the Parliament. In that case, the Court was actually dealing with Article 11 of the International Covenant on Civil and Political Rights, ratified by India. The Convention was taken note of by the Supreme Court for the purpose of giving an enlarged meaning to Article 21 of The Constitution. The same principle was reiterated and further expounded in the Apex Court's decision in ***State of West Bengal Vs. Kesoram Industries Ltd. [2004 (10) SCC 201]*** The Supreme Court pointed out that the doctrine of "Monism" as prevailing in the European countries, does not prevail in India and that the doctrine of dualism is applicable and that "a Treaty entered into by India cannot become law of the land and it cannot be implemented unless Parliament passes a law as required under Article 253."

Thus I do not see how the assessee can fall under the DTAA benefit when clearly the DTAA benefit has been overriden by a later-in-time, non-obstante section specifically inserted for bringing into the net specific areas ie tax havens, something which is the prerogative of the Indian Govt. **With respect to the Income Tax Act, the short point is S.94A will prevail over S.90**

Thus, on payments made to non-residents amounting to Rs. 91,32,564/- tax has to be withheld at the flat rate of 30% under section 94A of the Income Tax Act and that the assessee made the payments after the above introduction of S.94A r.w. Notification

dated 1-Nov-2013 and hence the amounts ought to be disallowed u/s 40(a)(i) of the Act.

Addition: Rs. 91,32,564/-

Penalty proceedings are to be initiated separately for both disallowances.

(G. Krishnamurthy)
Income-tax Officer
Company Circle-II(4)