

A CRITICAL ANALYSIS OF THE CONCEPT OF DOUBLE TAXATION AVOIDANCE AGREEMENT UNDER THE INCOME TAX ACT, 1961

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Double Taxation is the imposition of two or more taxes on the same income, asset or financial transaction. It refers to taxation by two or more countries of the same income, asset or transaction, for example income paid by an entity of one country to a resident of a different country. The double liability is often mitigated by tax treaties between countries.¹⁶⁵

Double Taxation Avoidance Agreements are treaties between two sovereign states. Such Agreements can also be between two countries which are not “sovereign” states in the full legal sense. Being Agreements between two contracting states it was found that it would be useful to have a Model Agreement which could be the basis for discussion between two states contemplating to conclude a Double Taxation Avoidance Agreement. The *League of Nations* for the first time commenced work in this behalf in 1921 and produced in 1928 the first Model Bilateral Convention.¹⁶⁶

It is not unusual for a business or individual who is resident in one country to make a taxable gain in another. In some cases, this requires that tax be paid in the country of residence and be exempt in the country in which it arises. In the remaining cases, the country where the gain arises deducts taxation at source and the taxpayer receives a compensating foreign tax credit in the country of residence to reflect the fact that tax has already been paid.¹⁶⁷

Double Taxation is not specifically forbidden either under domestic law or even under treaties. Bilateral double taxation treaties tend to avoid double taxation, but where tax benefit granted by one state are cancelled by the other in absence of any specific provision in the agreement, there is an economic disadvantage, which is not prohibited in general, a principle which has been universally accepted. In the modern context, a transaction is not always confined to two countries, because of value addition in more than one country, whether natural or because of planning. DTAA does not solve the problem of double taxation in multinational transactions.¹⁶⁸

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¹⁶⁵ Sumeet Kumar, *Double Taxation Avoidance Agreements – A Brief Overview*, Available At [Http://www.legalserviceindia.com/Article/1304-Double-Taxation-Avoidance-Agreements.html](http://www.legalserviceindia.com/Article/1304-Double-Taxation-Avoidance-Agreements.html) (Last Visited On 20th June)

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

HISTORICAL DEVELOPMENT OF DOUBLE TAXATION AVOIDANCE AGREEMENT

Genesis of Double Tax Avoidance Agreement is, perhaps, the first step towards a law, which may ultimately lead to an international society. Agreements between friendly States usually deal with non-aggression, trading and exchange of information as between them. But they have not integrated the countries for any length of time, as these agreements can be discarded easily as they have been formed. International law has been more a matter of law by consent. An international law to regulate the conduct of nations as between them has always been an objective of the academicians to establish peace in the world. But what is known as international law has, by and large, been denoting a system of customary and conventional rules of conduct, which are expected to regulate the intercourse between civilized nations.¹⁶⁹

Jagarmadha Rao, J., in a classic judgment in *C.I. T. v. Vishakhapatnam Port Trust*¹⁷⁰ had referred to the major developments in the field of tax treaties. In this case, the assessee was itself a Government undertaking engaged in the trading transaction with a non-resident German Company. It had undertaken to setup a plant in India and the issue related to the extent of non-residents' Indian income liable to Indian tax and the implication of the Double Tax Avoidance Agreement as between India and Germany.¹⁷¹ The judgment, incidentally, refers to the development of law on DTAA, which have themselves gone through various changes. Model forms applicable to all countries were first prepared by the fiscal committee of the League of Nations in 1927. Later the said committee conducted meetings at Mexico during 1943 and in London in 1946 and proposed several minor variations.¹⁷²

The OECD Model Convention though primarily meant for use by the OECD countries is often referred to and the Commentaries applied in interpreting Agreements between non-OECD countries also. In addition to the OECD Model, there was the UN Model Convention. Its origin lies in a resolution passed by the Economic and Social Council of the U.N. in August 1967 and was published in 1980 in the form of Model Double Taxation Convention between developed and developing countries.¹⁷³

¹⁶⁹ RAJARTNAM, S., VENKATARAMAIAH, B.V., TREATISE ON DOUBLE TAXATION AVOIDANCE AGREEMENT 1.3 (Snow White Publications 2010).

¹⁷⁰ (1983) 144 ITR (AP).

¹⁷¹ *Supra* Note 5 At 1.5

¹⁷² *Ostime (Inspector Of Taxes) V. Australian Mutual Provident Society* (1960) 39 ITR 210 (HL).

¹⁷³ *Supra* Note 5 At 1.6.

Like all laws, international taxation laws, evolving through such double taxation relief and avoidance agreements with some of them either incorporated or otherwise integrated with domestic law, is dynamic, rapidly undergoing changes with developments in trade, new methods of communication especially the laws relating to contract and sale of goods. The DTAA have also necessarily undergone changes every time they are revised or when a new agreement is being arrived at. India has in the recent times relaxed its trade restrictions, as a result of its international commitments, so that international taxation has become more relevant than it has been for Indian trade not only for those who are either exporters or importers but also because of the impact of international trade on local price of goods and services, since tax is a cost and a significant cost at that. Interpretation of DTAA has not only an effect on pricing policy but also on the business decisions of residents in undertaking cross border transactions.¹⁷⁴

Double tax treaties along with the other laws relating to foreign exchange, company law and immigration policy, policy relating to foreign investments play a major role in globalization. Double tax treaties only form a part of international taxation but a significant part of the same as long as both countries have their own system of taxation, whether restricted to the income arising within its jurisdiction or on global income of its residents.¹⁷⁵ India has comprehensive Double Taxation Avoidance Agreements with 79 countries. There are agreed rates of tax and jurisdiction on specified types of income arising in a country to a tax resident of another country.¹⁷⁶ Under the **Income Tax Act, 1961** of India, there are two provisions, **Section 90** and **Section 91**, which provide specific relief to taxpayers to save them from double taxation. **Section 90** is for taxpayers who have paid the tax to a country with which India has signed DTAA, while **Section 91** provides relief to tax payers who have paid tax to a country with which India has not signed a DTAA. Thus, India gives relief to both kinds of taxpayers.¹⁷⁷

CLASSIFICATION, OBJECTIVES, PATTERN AND INDIAN POLICY OF DTAA

Double taxation avoidance agreements, depending on their scope, can be classified as Comprehensive and Limited. Comprehensive Double Taxation Agreements provide for taxes on income, capital gains and capital, while Limited Double Taxation Agreements refer only to income from shipping and air transport, or estates, inheritance and gifts. Comprehensive agreements ensure that the taxpayers in both the countries would be treated equally and on equitable basis, in respect of the problems relating to double taxation.¹⁷⁸

¹⁷⁴ *Ibid.*
¹⁷⁵ *Supra* Note 1.
¹⁷⁶ *Supra* Note 5 At 1.15
¹⁷⁷ *Ibid* At 1.16.
¹⁷⁸ *Supra* Note 1.

The main object of a Double Taxation Avoidance Agreement is to provide for the tax claims of two governments both legitimately interested in taxing a particular source of income either by assigning to one of the two the whole claim or else by prescribing the basis on which tax claims is to be shared between them.¹⁷⁹

The need and purpose of tax treaties has been summarized by the OECD in the '*Model Tax Convention on Income and on Capital*' in the following words:

*It is desirable to clarify, standardize, and confirm the fiscal situation of taxpayers who are engaged, industrial, financial, or any other activities in other countries through the application by all countries of common solutions to identical cases of double taxation.*¹⁸⁰

The objectives of double taxation avoidance agreements can be enumerated in the following words:

First, they help in avoiding and alleviating the adverse burden of international double taxation, by laying down rules for division of revenue between two countries; exempting certain incomes from tax in either country; reducing the applicable rates of tax on certain incomes taxable in either countries. Secondly, and equally importantly tax treaties help a taxpayer of one country to know with greater certainty the potential limits of his tax liabilities in the other country. Still another benefit from the tax-payers point of view is that, to a substantial extent, a tax treaty provides against non-discrimination of foreign tax payers or the permanent establishments in the source countries vis-a-vis domestic tax payers.¹⁸¹

Double taxation agreements allocate jurisdiction with respect to the right to tax a particular kind of income. The principle underlying tax treaties is to share the revenues between two countries. If each country gets a reasonable share of tax revenues, the bilateral and multilateral trade prospers and the overall tax collection also increases as a result of which both countries tend to benefit. A double tax avoidance agreement deals by and large with business income, income from moveable property and from immovable property.¹⁸²

There are well established patterns of taxation of various types on income. The agreements provide of allocation of taxing jurisdiction to different contracting parties in respect of different heads of income. In general, the rules are to the following effect:

- Income from the business is taxed only in the resident country, if the business entity has no activity in the source state; only on the source state, if there is a fixed place of business, i.e. Permanent Establishment and to the extent it is attributable to that place.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

- Income from immovable property arising to a non-resident is taxed primarily in the state of its location, i.e. the source state.
- Income from movable property such as dividends, interests and royalties are primarily taxed in the resident state, but the source state may impose a reduced tax.¹⁸³

India primarily follows the UN model convention. The policy adopted by the Indian government in regard to double taxation treaties may be worded as follows:

*“Trading with India should be relieved of Indian taxes considerably so as to promote its economic and industrial development. There should be coordination of Indian taxation with foreign tax legislation for Indian as well as foreign companies trading with India. The agreements are intended to permit the Indian authorities to cooperate with the foreign tax administration. Tax treaties are a good compromise between taxation at source and taxation in the country of residence”.*¹⁸⁴

ANALYSIS OF THE PROVISIONS RELATING TO DTAA UNDER THE INCOME TAX ACT, 1961

Section 90 of the **Income Tax Act, 1961** states as follows:

(1) The Central Government may enter into an agreement with the Government of any country outside India —

(a) For the granting of relief in respect of income on which have been paid both income-tax under this Act and income-tax in that country, or

(b) For the avoidance of double taxation of income under this Act and under the corresponding law in force in that country, 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 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, and may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement.

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

(2) Where the Central Government has entered into an agreement with the Government of any country outside India 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.

(3) Any term used but not defined in this Act or in the agreement referred to in sub-section (1) shall, unless it 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.

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

Section 90: Agreements with Foreign countries for relief against or avoidance of double taxation etc.

This section empowers the Central Government to enter into an agreement with foreign countries for the granting of relief in respect of double taxation or for the avoidance of double taxation. In exercise of the powers conferred by the corresponding provision in the 1922 Act and by this section, agreements with many countries have been entered into for relief against or avoidance of double taxation.¹⁸⁵

As regards income which accrues to a resident of India, in a country with which there is no such agreement, relief is provided by section 91 of the Act.¹⁸⁶

Scope of sub-section (1):

The four clauses in sub-section (1) lay down the scope of power of the Central Government to enter into an agreement with another country. Clause (a) contemplates situations where tax has already been paid on the same income in both countries and it empowers the Central to grant relief in respect of such double taxation. Clause (b), which is wider than clause (a)¹⁸⁷, provides that an agreement may be made for the 'avoidance of double taxation of income under this Act and under the corresponding law, in force in that country'. This clause cannot be extended to make provisions in agreements for situations not relating to double taxation. However, it is not necessary that a situation regarding 'avoidance of double taxation' can arise when tax is actually paid in one of the contracting countries.¹⁸⁸ Moreover, as long as the objectives in these clauses are

¹⁸⁵ VYAS, DINESH, KANGA PALKHIWALA VYAS THE LAW & PRACTICE OF INCOME TAX 1512 (Lexis Nexis 2008).

¹⁸⁶ *Ibid* At 1513.

¹⁸⁷ UO/ V. Azadi Bachao Andolan 263 ITR 706, 733 (SC).

¹⁸⁸ *Ibid*.

sought to be effectuated by an agreement, the power of the Central Government cannot be said to have been used in an ultra vires manner.¹⁸⁹ Clauses (c) and (d) essentially deal with agreements made for the exchange of information investigation of cases and recovery of income tax.¹⁹⁰

With effect from April 2004, Clause (a) has been substituted to provide that an agreement may also be entered into for granting of relief in respect of income tax chargeable under this Act and under the corresponding law in force in that country, to promote mutual economic relations, trade and investment.¹⁹¹ With this amendment, the power of the Central Government has been greatly widened, and it can now enter into agreements not only for the avoidance of double taxation, but also for exempting income from taxation. It is clear from the language of the clause that this power can be used only for granting relief in respect of income tax, and not to create any fresh charge, obligation or responsibility.¹⁹²

EFFECT OF AGREEMENT:

The effect of an agreement made pursuant to this section as in under -

(i) if no tax liability is imposed under this Act, the question of resorting to the agreement would not arise. No provision of the agreement can possibly fasten a tax liability where the liability is not imposed by this Act.¹⁹³

(ii) if a tax liability is imposed by this Act, the agreement may be resorted to for negating or reducing it.¹⁹⁴

(iii) in case of difference between the provisions of the Act and the agreement under section 90, the provisions of the agreement prevail over the provisions of the Act and can be enforced by the appellate authorities and the courts.¹⁹⁵ However, as provided by sub-section (2) the provisions of the Act apply to the assessee in the event that they are more beneficial to him.¹⁹⁶

Where there is no specific provision in the agreement, it is the basic law i.e. the IT Act, 1961, will govern the taxation of income.¹⁹⁷ Where a double taxation avoidance agreement provides for a particular mode of computation of income, the same should be followed, irrespective of the provisions of the Act.¹⁹⁸ The charging provisions in section 4 and section 5 of the Act defining 'total income' of either residents or non-

¹⁸⁹ *Ibid.*

¹⁹⁰ *Supra* Note 21 At 1513.

¹⁹¹ Observation Of SCI On Pp 751-53 In UO/ V. *Azadi Bachao Andolan* 263 1TR 706.

¹⁹² *Supra* Note 21 At 1513.

¹⁹³ *CIT V. Muthaiah* 202 ITR 508, Approved In *UOI V. Azadi Bachao Andolan* 263 ITR 706

¹⁹⁴ *Ibid.*

¹⁹⁵ *CIT V. Vishakhaptanam Port Trust* 144 ITR 146; *CIT V. Davy Ashmore* 190 ITR 626; *CIT V. Muthaiah* 202 ITR 508

¹⁹⁶ *Abraham Express V. UOI* 212 ITR 31; *Timken India V. CIT* 256 ITR 460

¹⁹⁷ *CIT V. Daly Ashmore* 190 ITR 626.

¹⁹⁸ *Ibid.*

residents are expressly made subject to the provisions of this Act, which will include this section and the agreements made there under.¹⁹⁹

Where the Government of a State certifies that a person is resident of that State²⁰⁰ or has a permanent establishment in that State²⁰¹, the certification is binding on the other Government.²⁰²

'RELIEF AGAINST' OR 'AVOIDANCE OF':

If the agreement with the foreign country is under clause (a) for relief against double taxation and not under clause (b) for the avoidance of double taxation, the assessee must show that the identical income has been doubly taxed and that he has paid tax in both India and in the foreign country, on the same income.²⁰³ If the assessee paid no tax but a percentage of his gross receipts by way of royalty to the foreign country, that would not entitle him to double tax relief.²⁰⁴ If the tax has been overpaid in the foreign country and the excess is repaid to the assessee later when the rate of currency exchange has altered in computing the double taxation relief, the department cannot take into account such alteration in the rate of exchange.²⁰⁵

The time limit and form of application for claiming double taxation relief were dealt with in several cases.²⁰⁶ The departmental practice of permitting 'provisional claims' for double taxation relief was held not to be in violation of the Act.²⁰⁷

QUESTION OF VALIDITY OF AGREEMENTS MADE UNDER THIS SECTION:

The preamble to the Constitution of India acknowledges India as a sovereign republic and in the Constitution; this sovereignty is zealously guarded by keeping the sovereign power with regard to entering into agreements with foreign countries under absolute constitutional control. Under entry 14 to the Union List, the matter included is 'entering into treaties and agreements with foreign countries and implementation of treaties, conventions and agreements with foreign countries'.²⁰⁸

Thus, the exclusive power of the Parliament to make laws with regard to entering into treaties and agreements is all encompassing and consequentially, includes the power to legislate in this regard in the field of taxation and income. This specific power has been exercised by the Parliament by enacting section 90 of the IT Act, 1961. Under section 90, the Parliament has delegated to the Central Government the power to enter

¹⁹⁹ Azadi Bachao Case

²⁰⁰ Abrahim Express

²⁰¹ *CIT V. Lakshmi Textile* 245 ITR 521.

²⁰² *Supra* Note 21 At 1514.

²⁰³ *CIT V. New Citizen Bank* 58 ITR 468; *CIT V. Indian Bank* 61 ITR 632.

²⁰⁴ *Ashanti V. Merrifield* 19 TC 52.

²⁰⁵ *Grieg V. Ashton* 31 ITR 538.

²⁰⁶ *CIT V. Burmah Oil* 47 ITR 25; *Allauddin V. ITO* 52 ITR 900.

²⁰⁷ *Ibid.*

²⁰⁸ *Supra* Note 21 At 1515.

into an 'agreement' with the Government of any other country, and by notification in the Official Gazette make such provisions as may be necessary for implementing the Agreement.²⁰⁹

The power under this section is to be exercised for the purpose of 'avoidance of double taxation' or for granting relief where double taxation has already taken place. The Central Government therefore, has to stay within the parameters of the powers delegated to it, and cannot go beyond them.²¹⁰

The scope of clause (a) of sub-section (1) has now been enlarged with effect from April 2004, and questions regarding the validity of an agreement which relate to a period after that date must be viewed, in the context of the new wider power conferred upon the Central Government.²¹¹

The Supreme Court, in the case of *U.O.I v. Azadi Bachao Andolan*²¹², exhaustively considered this section, and has made, inter alia, the following observations:

- (i) a delegate (in this case, the Central Government) of the legislature can exercise the power of exemption in a fiscal statute.
- (ii) the validity of the agreement made under this section is to be determined by ascertaining whether it is within the parameters of the legislative provision.
- (iii) the principles governing the interpretation of treaties are not the same as those governing the interpretation of statutory language.²¹³

This section has not empowered the Central Government to enter into an agreement with retrospective effect.²¹⁴ The Bombay High Court in *CIT v. Tata Iron*²¹⁵, upheld the view that an agreement for the avoidance of double taxation cannot apply retrospectively nor can it apply to contracts executed prior to the date of the agreement.²¹⁶

OECD MODEL CONVENTION AND COMMENTARIES:

In *U.O.I v. Azadi Bachao Andolan*²¹⁷, the Supreme Court made reference to the OECD Model Convention, 1977 and the commentaries thereon, where an expression in the agreement before it was adopted from that Convention. Earlier, the AP High Court²¹⁸, had, while referring to various foreign authorities,

²⁰⁹ *Ibid.*

²¹⁰ *Indian Express V. UOI* 159 ITR 856.

²¹¹ *Supra* Note 21 At 1515.

²¹² 263 ITR 706.

²¹³ *CIT V. V. SRM Finn* 208 ITR 400.

²¹⁴ Cf *The Express Power To Make Rules With Retrospective Effect Under Section 295(4)*.

²¹⁵ 248 ITR 190.

²¹⁶ *Supra* Note 21 At 1516.

²¹⁷ 263 ITR 706.

²¹⁸ 144 ITR 146.

approved observations to the effect that in view of the standard OECD models, an area of genuine 'international tax law' was developing, and therefore, any person interpreting a tax agreement should consider the decisions and rulings worldwide relating to similar agreements. Therefore, the model convention and commentaries may be useful guides when the agreement before the court is similar to the model convention.²¹⁹

In contrast, for the purposes of interpretation of another agreement, the Madras High Court²²⁰, found reliance on the OECD Convention and commentaries inappropriate and unjustified. It noticed a wide range of difference between the Model Convention and the agreement thereon and hence concluded that commentaries on the Model Convention 'can be of no use and utility and cannot also afford a safe or reliable guide or aid for such construction'.²²¹

Sub-section (3):

This sub-section, applicable from April 2004, relates to terms used, but not defined in this Act or any agreement made under sub-section (1). Such terms are to have the same meaning as assigned to them in any notification issued in this behalf by the Central Government. However, the meaning of such term must not be inconsistent with the provisions of the Act or the agreement; further, the term must be interpreted differently, if the context so requires.²²²

Explanation to Section 90:

The Finance Act, 2001 has inserted an explanation to this section with retrospective effect from the commencement of this Act, to clarify that the charge of tax in respect of a foreign company at a higher rate than the rate at which a domestic company is chargeable, shall not be regarded as a less favourable charge or levy of tax in respect of such foreign company, where the foreign company has not made the prescribed arrangement for declaration and payment within India, of the dividends payable out of his income in India.²²³

Appeal & Reference:

An appeal for refund may be made under section 237 by an assessee entitled to relief under this section, and from the order of the assessing officer, on such application for refund an appeal would lie to the CIT(A), a second appeal to the tribunal and reference to the High Court.²²⁴

Section 90A of the Income Tax Act, 1961 states as follows:

²¹⁹ *Supra* Note 21 At 1516.

²²⁰ 208 ITR 400, 420-21.

²²¹ *Supra* Note 21 At 1516.

²²² *Supra* Note 21 At 1517.

²²³ *Ibid.*

²²⁴ *Wallace V. CIT* 26 ITR 241; *Burma Oil V. ITT* 33 ITR 794.

1. Any specified association in India may enter into an agreement with any specified association in the specified territory outside India and the Central Government may, by notification in the Official Gazette, make such provisions as may be necessary for adopting and implementing such agreement,

(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 any specified territory outside India; or

(ii) income-tax chargeable under this Act and under the corresponding law in force in that specified territory outside India 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 specified territory outside India, 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 specified territory outside India, 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 - specified territory outside India.

2. Where a specified association in India has entered into an agreement with a specified association of any specified territory outside India under sub-section (1) and such agreement has been notified under that sub-section, 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.

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.

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

Explanation 2. For the purposes of this section, the expressions

(a) Specified association means any institution, association or body, whether incorporated or not, functioning under any law for the time being in force in India or the laws of the specified territory outside India and which may be notified as such by the Central Government for the purposes of this section;

(b) Specified territory means any area outside India which may be notified as such by the Central Government for the purposes of this section.]

Section 91 of the **Income Tax Act, 1961** states as follows:

- (1) If any person who is resident in India in any previous year proves that, in respect of his income which accrued or arose during that previous year outside India (and which is not deemed to accrue or arise in India), he has paid in any country with which there is no agreement under section 90 for the relief or avoidance of double taxation, income-tax, by deduction or otherwise, under the law in force in that country, he shall be entitled to the deduction from the Indian income-tax payable by him of a sum calculated on such doubly taxed income at the Indian rate of tax or the rate of tax of the said country, whichever is the lower, or at the Indian rate of tax if both the rates are equal.
- (2) If any person who is resident in India in any previous year proves that in respect of his income which accrued or arose to him during that previous year in Pakistan he has paid in that country, by deduction or otherwise, tax payable to the Government under any law for the time being in force in that country relating to taxation of agricultural income, he shall be entitled to a deduction from the Indian income-tax payable by him —
 - a) of the amount of the tax paid in Pakistan under any law aforesaid on such income which is liable to tax under this Act also.; or
 - b) of a sum calculated on that income at the Indian rate of tax; whichever is less.
- (3) If any non-resident person is assessed on his share in the income of a registered firm assessed as resident in India in any previous year and such share includes any income accruing or arising outside India during that previous year (and which is not deemed to accrue or arise in India) in a country with which there is no agreement under section 90 for the relief or avoidance of double taxation and he proves that he has paid income-tax by deduction or otherwise under the law in force in that country in respect of the income so included he shall be entitled to a deduction from the Indian income-tax payable by him of a sum calculated on such doubly taxed income so included at the Indian rate of tax or the rate of tax of the said country, whichever is the lower, or at the Indian rate of tax if both the rates are equal.

Explanation: In this section,

- (i) The expression "Indian income-tax" means income-tax charged in accordance with the provisions of this Act;
- (ii) The expression "Indian rate of tax" means the rate determined by dividing the amount of Indian income-tax, after deduction of any relief due under the provisions of this Act but before deduction of any relief due under this chapter, by the total income;
- (iii) The expression "rate of tax of the said country" means income-tax and super-tax actually paid in the said country in accordance with the corresponding laws in force in the said country after deduction of all relief due, but before deduction of any relief due in the said country in respect of double taxation, divided by the whole amount of the income as assessed in the said country;
- (iv) The expression "income-tax" in relation to any country includes any excess profits tax or business profits tax charged on the profits by the Government of any part of that country or a local authority in that country.

Section 91: Unilateral Relief in respect of Foreign Income Taxed Abroad

Sub-section (1) of this section grants unilateral relief in cases-where section 90 does not apply, subject to the fulfillment of the following conditions:

- (a) the assessee should be the resident in India in the previous year;
- (b) the income should have accrued in fact outside India²²⁵ and should not be deemed under any provision of this Act to accrue in India;
- (c) the income should be taxed both in India and in a foreign country with which India has no agreement for relief against or avoidance of double taxation²²⁶;
- (d) the assessee should have in fact paid the tax in such foreign country by deduction or otherwise.

Unilateral relief under this section is available only in respect of the 'doubly taxed income', i.e. the part of the income which is actually included in the assessor's total income: the amount deducted under Chapter VI-A is not doubly taxed and therefore, no relief is allowable in respect of such amount.²²⁷ Further, the section

²²⁵ *Jeevanlal V. CIT* 79 ITR 147.

²²⁶ *Ramanathan V. CIT* 88 ITR 169.

²²⁷ *CIT V. Bhatt* 185 ITR 592.

contemplates granting of relief calculated on income country wise and not on the basis of aggregation or amalgamation of income from all foreign countries.²²⁸

This section should be literally construed; the dividend from a UK company, from which tax is deducted and retained by the company, is entitled to relief under this section, and the passing of an assessment order in the UK, in respect of such dividend is not necessary.²²⁹

On order that this section may apply, it is necessary that the foreign tax should be levied in a country with which India has no agreement for relief against or avoidance of double taxation; but it is immaterial that the tax paid in such foreign country is in respect of income arising in another foreign country with which India has such an agreement.²³⁰

In similar circumstances, sub-section (3) affords relief to a non-resident in respect of his share in the foreign income of a registered firm, which is assessed as resident in India. For determining the Indian rate of tax under clause (ii) of the Explanation, abatement allowable under the agreement of avoidance of double taxation between India and any other country should not be deducted from the Indian income tax.²³¹

In *Gamman India v. CIT*²³², the Bombay High Court held that a relief under section 91 could not be claimed in rectification proceedings under section 154, but the Calcutta High Court took a contrasting view in the case of *CIT v. United Commercial Bank*.²³³

CONCLUSION

The regime of international taxation exists through bilateral tax treaties based upon model treaties, developed by the OECD and the UN, between the Contracting States. India has entered into a wide network of tax treaties with various countries all over the world to facilitate free flow of capital into and from India. However, the international tax regime has to be restructured continuously so as to respond to the current challenges and drawbacks.

Nearly all tax treaties provide a specific mechanism for eliminating double taxation which is still potentially present. This mechanism usually requires that each country grant a credit for the taxes of the other country to

²²⁸ *CIT V. Bombay Burmah* 259 ITR 423

²²⁹ *CIT V. Clive* 133 ITR 636.

²³⁰ *Supra* Note 21 At 1520.

²³¹ *CIT V. Rajanagr Tea* 97 ITR 405.

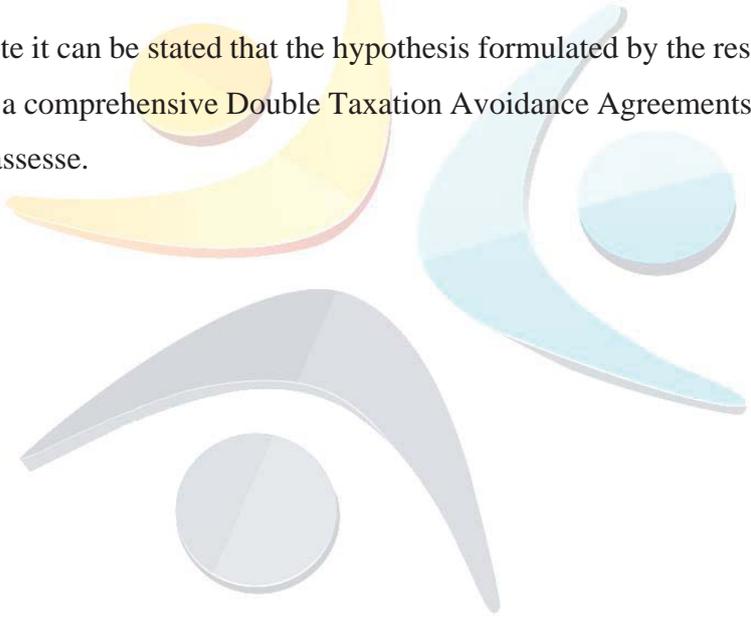
²³² 214 ITR 50.

²³³ 206 ITR 641.

reduce the taxes of a resident of the country. The treaty may or may not provide mechanisms for limiting this credit, and may or may not limit the application of local law mechanisms to do the same.

The basic issue which arises in the interpretation of a Double Taxation Avoidance Agreement is that of the position where there is a conflict between the provisions of the Act and the provisions of the applicable Double Taxation Avoidance Agreement. Section 90(2) of the Act makes it abundantly clear that where an agreement for granting relief of tax or for avoidance of double taxation has been entered into, then, in relation to the assessee to whom such agreement applies, the provisions of the Act to the extent that they are more beneficial as compared to the provisions of the Double Taxation Avoidance Agreement would have to be applied. It follows that where the provisions of the applicable Agreement are more favorable, compared to the provisions in the Act, the provisions of the Agreement will prevail.

Hence, on a concluding note it can be stated that the hypothesis formulated by the researcher has been proved correct partially. India has a comprehensive Double Taxation Avoidance Agreements with several nations for the benefit granted to the assessee.



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