Approach of Supreme Court in Double Taxation Relief in India

Jamshed Ansari

Asstt. Professor (Guest Faculty), Faculty of Law, University of Delhi, Delhi (INDIA)
E-Mail- jamshedansari024@gmail.com

Abstracts: The author aims to examine the approach of Supreme Court in Double Taxation Relief in India. Further to see whether there is change of the view of the Supreme Court before and after the liberalization era. The author has taken the view whether the Double Taxation Avoidance agreement between India and Mauritius is being abused by the "treaty shopping" for the purpose of fiscal evasion. The Supreme Court has interpreted the DTAA and the Income Tax Act, 1961 as to encourage mutual economic relations, trade and investment between the contracting countries and tried to give the answers to the following framed questions: What is the position where there is a conflict between the provisions of the statute and the provisions of the applicable Double Taxation Avoidance Agreement? Which country is entitled to tax a particular income where there is DTAA and in case where there is no DTAA between Countries? Whether empowering central government to define by notification in the official gazette the terms not defined in the DTAA or the Income Tax Act is in violation of principles of treaty jurisprudence. What are the approaches of SC regarding relief in Double Taxation? Whether DTAA entered into between India and different tax haven countries is abused through "treaty shopping". Why Double Taxation Avoidance Treaties are bilateral, rather than multilateral such as the GATT. The research paper is limited to examine the approach of Supreme Court in Double Taxation Relief. For which the authors have to go in history of DTAA and the Indian Income Tax Law, case laws and the surrounding materials.

[Ansari, Jamshed. **Approach of Supreme Court in Double Taxation Relief in India.** *Researcher* 2014;6(5):6-12]. (ISSN: 1553-9865). http://www.sciencepub.net/researcher. 2

Key Words: *Double taxation relief, DTAA, treaty shopping, avoidance agreement etc.*

1. Introduction

In the age of globalization, it is common to find companies making cross border investments. The need for the companies to constantly increase their market share has made the world a global village. The companies prefer to make a sound investment decision and take into consideration all aspect of investments. Taxation of income earned is also one among the important considerations before making the investment. To come out with the problem of double taxation the countries make tax agreement. The Tax Treaties occupied different positions among different constitutions of the world. For e.g., in America, treaty is an Act of Legislation and the courts are bound to enforce the same. The American Senate approves the treaty by two third majorities. The tax treaties in India are not approved by the Parliament. It is also debatable topic that whether tax treaty overrides the domestic law. Tax treaty will deal with the question of the overlapping jurisdiction and resolve the issues concerning the taxation of income on the basis of residence or location. The conflict of interest has to be resolved by the application of treaty provisions. In order to strength economic cooperation and avail the better technology and larger capital, India has entered into DTAAs with many countries. In India, the power of Central Government to enter into an agreement with foreign country has been given under Sections 90 and 91 of the IT Act, 1961.The grant of double taxation relief in terms of Sections 90 and 91 of the Income Tax Act, 1961 has been an area of controversy. The implementation of Indo- Mauritius DTAA has also come in for criticism on the ground that it encourages tax evasion. The companies not actually based in Mauritius chose to route their investment in India through Mauritius taking advantage of the soft tax laws of that country.

The author is to examine the approach of Supreme Court in Double Taxation Relief. Further to see whether there is change of the view of the Supreme Court before and after the liberalization era. According to the Author the Double Taxation Avoidance agreement between India and Mauritius is being abused by the "treaty shopping" for the purpose of fiscal evasion. The SC has interpreted the DTAA and the Income Tax Act, 1961 as to encourage mutual economic relations, trade and investment between the contracting countries. The author cited many cases in favour of his hypothesis.

2. Double Taxation Relief & Double Taxation Avoidance Agreement:

Double Taxation means taxing the same income twice, once in the home country and again in the host country. It has been held by the Supreme Court in case of ***Sri Krishna Das v. Town Area Committee,***[1] that the expression "double taxation" is generally used to mean

[1] (1990) 183 ITR 401 (SC)

taxing the same property or the subject matter twice, for the same purpose, for the same period. It is extremely important to mention here that no rule of International Law prohibit the Double Taxation. So it is for the countries of the international arena to solve the problem of Double Taxation. Therefore, the negotiations for the tax treaties became important to meet the end hence the countries have been entered in a large numbers of tax agreement based on Organization of Economic Cooperation Development (OECD) and UN models with suitable changes where necessary to meet the special needs of contracting countries. The tax agreements between countries are in the nature of contract.

Sections 90 and 91 given in Chapter IX of Income Tax Act, 1961 (India) deals with granting relief from double taxation to taxpayers. According to Section 90[2] of the Income Tax Act, 1961 the Central Government has been empowered to enter into an agreement with the Government of any other country for the purposes of granting relief in respect of income on which income tax had been imposed both in India and in the foreign country under the law in forced in the respective countries. The Central Government may also enter into an agreement with the government of foreign country for granting relief in respect of income tax chargeable under Income Tax Act in India and the corresponding law in force in that country to promote mutual economic relation, trade and investment. As per the provisions of Section 90 the Central Government has signed the Double Taxation Avoidance Agreement with many countries.

2.1. Double Taxation Avoidance Agreement:

DTAA can be generally called as agreement between two countries for the avoidance of double taxation and for the prevention of fiscal evasion regarding taxes on income. The agreement for avoiding double taxation may also provide for the manner of recovery of income tax in India and in the foreign country and also for the exchange of information to prevent evasion or avoidance of tax coupled with investigation of cases relating thereto.[3] As per the provisions of sub- section (2) of Section 90, where the Central Government entered into an agreement with the Government of foreign country then in relation to the assessee the provisions of Income Tax Act, 1961 shall apply to the extent they are more beneficial to the assessee.

2.2. The objective of DTAA:

The objectives of double taxation avoidance agreements can be following:

1) They help in avoiding the adverse burden of international double taxation by making an agreement for division of revenue two countries, exempting some incomes from tax liability in either country and by reducing the rates of tax on some incomes taxable in either country.

2) The tax treaties help the taxpayer of one country to know with greater certainty the probable limits of his tax liabilities in the other contracting country.

3) The tax treaty provides, from the taxpayer point of view, against non-discrimination of foreign tax payers or the permanent establishments in the source countries and the domestic tax payers.

The purpose of an Agreement is "avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains and for the encouragement of mutual trade and investment"[4].

2.3. Effects of the DTAA:

Followings are the main effects of the DTAA:

---

[2] Section 90 of the IT Act, 1961 provides, (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.

(3) Any term used but not defined in this Act or in the agreement referred to in subsection (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.

[3] R. Santhanam, Double Taxation Relief under Treaties (2004) CTR, p. 90.

[4] The preamble of the Indo- Mauritius Double Taxation Avoidance Agreement, 1983

i. "In case of difference between the provisions of the domestic Tax Law and the agreement, the provisions of the agreement will prevail over the provisions of the domestic Law and can be enforced by the Appellate Authorities and the Court,

ii. If the tax liability is imposed by the Act, the agreement may be resorted to for negating or reducing it,

iii. If no tax liability is imposed under the Act, the question of resorting to the agreement would not arise."[5]

With respect to the agreement with Malaysia, the Karnataka HC in the case of *CIT v. R.M. Muthaiah*[6] , held that the agreement would override the provisions of the Income Tax Act, 1961.

2.4. General Principles of Double Taxation:

1. *Basis of taxation:*

There are two bases of taxation i.e. the source of income rule and the residence rule. "The countries follow either of these rules, or a mixture of them. In India, the liability of an assessee depends upon his residential status during the previous year. The basis for taxation in most of the countries is similar to that of Indian system. For this the income must have been accrued or received in more than one country and the person may be liable to tax in more than one country"[7].

2. *Relief against Double Taxation:*

The relief against double taxation can be provided in two ways: a.) *Bilateral relief,* and b.) *Unilateral relief*. Where there is an agreement with foreign countries to avoid double taxation, it is called bilateral relief. As per the provisions of Section 90 of the Income Tax Act, 1961 the Central Government is empowered to enter into an agreement with different countries to avoid double taxation and thereby provides bilateral relief to the taxpayer. Where there is no agreement with the foreign country for the purpose of avoiding double taxation and the relief is granted then such relief is called as unilateral relief. Section 91 of the Income Tax Act, 1961 makes provision with respect to unilateral relief.

3. *Sovereign power to enter into agreement:*

As per the provisions of Article 265 of the Constitution of India, no tax shall be imposed save by authority of law. Further, according to Section 90 read with entry 14 of the Union List to the VII Schedule of the Constitution of India, only Central Government can enter into the agreement with the foreign country to avoid double taxation and to prevent evasion of taxes.

4. *Model for DTAA:*

In the matter of double taxation, it is extremely important to ensure that there is uniformity in granting relief. This is also to ensure that the assessee does not find himself in difficulty to order his affairs according to tax laws world over. The DTAA is often negotiated on the basis of standard form. There are two standard forms exist as of now and these help to attain the objective/ goal of uniformity. OECD and UN model are most popular. The OECD emphasizes the residence principle while the UN model compromises between the source and the resident principle. India follows either OECD form or UN model. In addition to the OECD Model, there is the UN Model Convention. The origin of UN model lies in a resolution passed by the Economic and Social Council of the U.N. in 1967 and was published in 1980 in the form of Model Double Taxation Convention between developed and developing countries.

5. *Scope of Section 90 of the IT Act, 1961:*

As per Section 90 of the Act, the Central Government is empowered to enter into an agreement with the foreign countries for the purpose of avoiding double taxation or to case no agreement is entered within the countries, the relief is granted under Section 91 of the Income Tax Act, 1961.

2.5. Pattern of Taxation

The following heads of income are taxed in accordance with the Double Taxation Avoidance Agreements:

a. Income from the business is taxed in the country of residence to that place,

b. Income from immovable property, if the business entity has no action in the source state; if there is Permanent Establishment and to the extent it is attributable arising to a non-resident is taxed primarily in the state of its location, i.e. the source state.

c. Income from movable property such as interests, dividends and royalties are first and foremost taxed in the resident Country, but the source Country may impose a reduced tax.

3. Statutory Framework To Grant Double Taxation Relief In India

3.1. Power under the Constitution of India:

As per the provisions of Article 265[8] of the Constitution of India, the sovereign power to levy taxes and to enforce collection and recovery thereof has been conferred on the State. The powers to levy taxes are conferred on the Central Government in respect of matters falling under the domain in Union List i.e. List-I of the VII Schedule to the Constitution

[5] Kanga and Palkhivala, The Law and Practice of Income Tax, Ed. 8, p. 1000.

[6] (1993) 110 CTR (Kar) p. 153

[7] T.C.A. Ramanujam, Double Taxation Avoidance Agreements- Need for fresh look, (2004)192, CTR, p. 239

[8] Article 265 of the Constitution of India provides, "No tax shall be levied or collected except by authority of law".

and the powers to levy taxes conferred on the State Governments are falling under the domain in State List i.e. List II of the VII schedule to the Constitution of India. One of the Entries i.e. Entry 14 of List-I empowers the Union of India to enter into an agreement and treaties with foreign countries and to implement such an agreement, treaties and convention. Accordingly, the union of India has entered into DTAA with other countries to avoid double taxation. The DTAA binds both the countries.

3.2. Rationale for entering into an Agreement

Section 90 of the Income Tax Act, 1961 is an enabling provision which empowers the Central Government to enter into an agreement with the government of foreign country to avoid double taxation. The main objective of the treaty/ agreement is to promote mutual economic relation, trade and investment and this is based on the principles of reciprocity. The agreement do not empower any contracting country to enjoy more power than vested in them or curtail any benefit to which the taxpayers are entitled. Thus, we can say that the agreement is designed to grant relief in respect of income on which income tax had been paid under the Indian Income Tax Law and the Tax Law of the treaty country.

In accordance with Section 90 read with Entry 14 of the Union List to the Seventh Schedule of the Constitution of India, the central Government has entered into agreement with many countries to avoid double taxation and to increase the investment and economic development.

3.3. Amendment of Section 90 of Income Tax Act, 1961

The Finance Act, 2003 amended Section 90 of the Income Tax Act, 1961. Section 90 as it originally stood provides that the Central Government may enter into an agreement with the government of foreign country for granting relief in respect of income which has been doubly taxed in both of the countries. The amended provision now secures that the DTAA may be entered into for granting of relief in respect of the income chargeable under the Indian Income Tax Act or the corresponding Tax Law in force in the contracting country *to promote mutual economic relations, trade and investment. The object behind amendment is to encourage international trade and commerce.*

Amendment violates the principle of treaty jurisprudence:

Another amendment in Section 90 of the Income Tax Act, 1961 violates the principle of treaty jurisprudence. It is because; sub- Section (3)[9] of Section 90 reserves the Central Government the power to define, by the Notification in the Official Gazette, the terms not defined in the DTAA or the Income Tax Act. Notification of definition by the Central Government is not binding on the non- resident unless the same was made part of the agreement. The assumption of unilateral power by the Central Government in this regard is against the very spirit of DTAAs.

4. Which Country Can Tax Income?

It is to be noted here that there is always an issue regarding the implementation of Double Taxation Avoidance Agreement as to which country is entitled to tax a particular income. The DTAA is to determine the jurisdiction of the contracting countries to tax a particular income.

Permanent establishment:

Generally, on a perusal of the various DTAA's, it is found that the taxation of the business profits depends upon the existence of the 'permanent establishment'. Permanent Establishment is one of the most litigated areas of the DTAA as to what would constitute a Permanent Establishment. Though the permanent establishment is defined in each and every Double Taxation Avoidance Agreement which a country enters into with another country.

As per paragraph 1 of Article 5 of India-Netherlands Tax Treaty, permanent establishment means any fixed place of business through the business of an enterprise is wholly or partly carried on.

As per paragraph 2 of Article 5 of India-Netherland Tax Treaty, 'permanent establishment' may include-

a) A place of management
b) A branch
c) An office
d) A factory
e) A workshop
f) A mine, an oil or gas well, a quarry or any other place for extraction of natural resources
g) A warehouse in relation to a person providing storage facilities for others
h) A premises used as a sales outlet
i) An installation or structure used for exploration of natural resources provided that the activities continue for more than 183 days.

In a case of CIT v. Visakhapatnam Port Trust[10], the Andhra Pradesh HC held that Permanent Establishment postulates the existence of the substantial elements of an enduring or a permanent nature of a foreign enterprise in another country which

[9] Section 90 (3) provide, "Any term used but not defined in this Act or in the agreement referred to in subsection (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."

[10] (1983) 144 ITR, p. 146.

can be attributed to a fixed place of business in that country. It should be of such a nature that it would amount to a virtual projection of a foreign enterprise of one country into the soil of another country.

Some issues regarding Permanent Establishment:

a) *Whether representative office is a PE:*

Representative office is generally not allowed to carry on any business in the country where it is established. They merely act as a post office or a point of contact between the company and the customers in the other country. Therefore the representative office cannot be regarded as PE[11].

b) *Whether moving vessel a PE:*

The services are generally like installation of pipelines, burial, hook up, testing etc. There they have to work from the vessels which act as their base. It was argued by the assessee that the vessels cannot be regarded as PE as paragraph 1 of Article 5 envisages a fixed place of business and since the vessels move from place to place, it cannot be regarded as fixed place of business and hence not a PE. The issue came before the Mumbai Tribunal in *Dy. CIT v. Subsea Offshore Ltd.*[12] It was held by the Mumbai Tribunal that the vessels cannot be regarded as PE as paragraph 1 of Article 5 envisages a fixed place of business and since the vessels move from place to place, it cannot be regarded as fixed place of business and hence not a PE.

5. Approach Of Supreme Court In Double Taxation Relief

5.1. <u>Pre- liberalization era:</u>

✓ **Hindustan Construction Co. Ltd. v. V.S. Gaitonde, Income Tax Officer, Companies Circle I (3), Bombay and Anr[13].**

J. C. Shah, M. Hidayatullah, P. B. Gajendragadkar, R. S. Bachawat and S. M. Sikri, JJ.

In this case the appellant claimed the set off of taxes under Section 49E[14] and 59 of the Income Tax Act, 1922.

The question to be solved is whether there should be a prior adjudication existing before a set-off can be allowed under section 49E. The court was of the view that not necessary. But it held that there must be a subsisting obligation to make the payment of refund before a person is entitled to claim a set off under S. 49E. There is no debate on the fact that the income tax officer had already rejected the request of the appellant to refund his tax. Now it is clear that there is no obligation on part of the IT Officer to refund the same to the appellant. Finally the court held that the appellant cannot claim the set off as given under section 49E as there in no due on part of the IT Officer.

✓ **McDowell & Company v. CTO*[15]***

In this case the SC laid down it is open to the Income Tax Officer in a given case to lift the corporate veil for finding out whether the purpose of the corporate veil is avoidance of tax or not.

5.2. Post liberalization era:

With the liberalization of international trade and commerce the Supreme Court too have changed its views favoring the globalization of international trade and commerce. In the series of cases the Supreme Court gave its decision which encourages the mutual economic relations, trade and investment between Government of India and the Government of different countries. Some of the important cases are as follows:

✓ **Shiva Kant Jha v. Union of India[16]**

In this case the Delhi HC quashed the Circular of the CBDT stating that the residence certificate issued by the Mauritius Authorities would constitute sufficient evidence. The HC had pointed out that the "treaty shoppers" were abusing the Mauritius rout for investment in India solely to avoid the lawful tax.

✓ **Union of India & Anr. v. Azadi Bachao Andolan Anr.[17]**

The DTAA between the Government of India and the Government of Mauritius dated 1-4-1983 is the subject matter of the present controversy in the instant case.

In 1994 a Circular No. 682 was issued by the Central Board of Direct Taxes that capital gains of any resident of Mauritius by alienation of shares of an Indian company shall be taxable only in Mauritius according to Mauritius taxation laws and will not be liable to tax in India. Relying on this, a large number of Foreign Institutional Investors, which were resident in Mauritius, invested large amounts of capital in shares of Indian companies with expectations of making profits by sale of such shares without being subjected to tax in India. During the year 2000, Income Tax authorities issued show cause notices to some FIIs functioning in India calling upon them to show cause as to why they should not be taxed for profits and for dividends accrued to them in India. The basis on which the show cause notice was issued was that the recipients of the show cause notice were

---

[11] Dhanshyam Patel, Basic concepts of Double Taxation Avoidance Agreements, 2000, vol. 108, Tax Literature.

[12] (1998) 66 ITD, p. 296

[13] AIR 1965 SC p. 1316

[14] Section 49E reads as "Power to set off amount to refunds against tax remaining payable. - Where under any of the provisions of this Act, a refund is found to be due to any person, the income tax Officer, Appellate Assistant Commissioner or Commissioner, as the case may be, may, in lieu of payment of the refund, set off the amount to be refunded, or any part of that amount against the tax, interest or penalty, if any, remaining payable by the person to whom the refund is due."

[15] [1985] 154 ITR 148 (SC)

[16] (2002) 175 CTR (Del) 371

[17] [2003] 263 ITR 706 (SC)

mostly shell companies incorporated in Mauritius, operating through Mauritius, whose main purpose was investment of funds in India. It was alleged that these companies were controlled and managed from countries other than India or Mauritius and as such they were not "residents" of Mauritius so as to derive the benefits of the DTAC. These show cause notices resulted in panic and consequent hasty withdrawal of funds by the FIIs. As a result most of the investors withdrawal their funds.

The Indian Finance Minister issued a Press note dated 4-4-2000 clarifying that the Circular did not affect or reflect the policy of the Government of India with regard to denial of tax benefits to such FIIs.

The CBDT issued another Circular no. 789 clarifying that the Indo- Mauritius DTAA, 1983 applies to both resident of India and Mauritius. As per the provisions of Article 4 of the DTAA, a resident of Mauritius includes the persons operating business in the Mauritius and hence they are to be benefitted by the DTAA.

The Circular no. 789 was challenged before the Delhi HC praying to declare the same as illegal and void. The HC declared the Circular illegal and void stating that the "Treaty Shopping", by which the resident of a third country takes advantage of the provisions of the Agreement, is illegal and thus necessarily forbidden.

The matter was appealed before SC. It has been held by the SC that it is not essential that the same income must be taxed both in India and foreign country simultaneously. The SC drew support from many judgments. Investors having place of business in Mauritius shall be deemed to be resident of Mauritius.

In the case of *John N. Gladen v. Her Majesty the queen*[18] the Federal Court held that the non- resident could benefit from the exemption given to the income under the treaty regardless of the question whether the same income is actually taxed or taxable in the country to which he belongs under the domestic law.

Further, the SC drew the support from the judgments of the cases of *Commissioner of Taxation v. Lamesa Holdings*[19], *Chong v. Commissioner of Taxation*[20] *and the Estate of Michael Hausmann v. Her Majesty the Queen*[21] in all of which the Federal Court of Australia in first two cases and the court of Canada in the third case have clearly laid down that the benefit of exemption under DTAA is clearly admissible to the non- resident regardless of the question whether income sought to be claimed as not taxable in the foreign country under DTAA is taxed in the country of residence of the non- residence as per the domestic income tax law applicable and in force.

✓ **Commissioner of Income Tax v. P.V.A.L. Kulandagan Chettiar (dead) through L.Rs.**[22]

S. Rajendra Babu, CJ and G.P. Mathur

In this case two questions came to be decided by the Court:

1) Whether the Malaysian income cannot be subjected to tax in India on the basis of DTAA entered into between Government of India and Government of Malaysia?

2) Whether the capital gains should be taxable only in the country in which the assets are situated?

The Court held that tax liability arising in respect of a person residing in both the contracting States has to be determined with reference to his close personal and economic relations with one or the other. Business income out of the rubber plantations cannot be taxed in India because of closer economic relations between the assessee and Malaysia in which the property is located and where the permanent establishment has been set up will determine the fiscal domicile.

"Revenue collection from Direct Taxes has been growing consistently for the last five years. The Direct Tax Collections as a percentage of GDP has grown from 2.68% in F.Y. 1998-99 to 6.27% in F.Y. 2008-09. As a result of improved tax administration and better tax compliance direct tax collection is displaying positive trends. An amount of Rs 3,33,818 crore (provisional) has been collected up to 31st March'09 at a growth rate of around 6.9% over previous year's corresponding collection of Rs 3,12,213 crore. During the span of last five years, the collection has more than trebled. During 2003-04, the direct taxes collection was Rs 1,05,088 crore and for the year 2008-09, the direct taxes collection has reached Rs 3,33,818 crore (provisional).

The collection from TDS till 31st March'09 is Rs 1,30,172 crore which is at a very healthy growth rate of around 25% over corresponding figure last year"[23].

6. Why Tax Treaties Are Bilateral And Not Multilateral

There are many reasons why the tax treaties are bilateral and not multilateral. These are as follows[24]:

1) Taxation involves the sensitive issue of sovereignty. No treaty can lay down restriction on the exercise of rights and powers by the State to decide what is to be taxed, how and subject to which condition. This is for the state to agree to refrain from

[18] 85 DTC 5188

[19] (1997) 785 FCA

[20] (2000) FCA 635

[21] (1998) Canadian Tax CT- Lexis 1140

[22] (2004) 6 SCC p. 235

[23] Annual Report 2009-2010, Ministry of Finance, government of India.

[24] K. Srinivasan, Guide to Double Taxation Avoidance Agreements, Ed. 4th, 1998, Vidhi Publishing (P) Ltd., New Delhi, paras 2.6.1 & 2.6.2.

the exercise of their jurisdiction in their mutual interests in certain specified circumstances.

2) Another reason is that no two countries are alike in their development in the different sectors of the economy. Therefore, there can be no uniformity in the sacrifices they can make or the accommodation they may need in revenue adjustment or allocations which are an integral and essential part of the tax treaty. The conflict of interest between the developed and the developing countries continues. The question whether a right of taxation should be given to the country of source of the income or the country in which it is received is yet to be resolved satisfactorily.

3) There is no international law on taxation which shall regulate it. Practice, procedure and even substantive law on taxation vary from country to country. The object of the tax treaty is avoidance of hardship to its nationals with any source of income in the contracting country. The scope for the country of residence to tax the income of its nationals in the source country is curtailed to the extent that the later also taxes that income.

4) A country negotiates treaties only with the countries with which it has already significant volume of trade or it expects trade to develop. A treaty may follow or precede trade but sometimes there is no hope of trade with the particular country even then treaty is entered. Comprehensive treaties covering all categories of income are entered into where the flow of trade justifies it. Limited agreements on particular sector are negotiated when the problem is confined to taxation of that particular field.

Conclusion

With the emergence of globalization, India has entered into tax agreement with many countries to avoid double taxation and to encourage economic cooperation, trade and investment. As regard to the use of permanent establishment to tax income of an enterprise is extremely important as tax can be imposed if the business is carried on regularly through a PE. Many foreign institutional investors who trade on the Indian stock markets operate through Mauritius. The DTAA between India and Mauritius, the capital gains arising from the sale of shares are taxable in the country of residence of the shareholder and not in the country of residence of the company whose shares have been sold. Hence, an investor company resident in Mauritius selling shares of an Indian company will not pay tax in India. Since there is no capital gain tax in Mauritius, the gain will escape tax altogether. The liberal interpretation of treaty by the SC as favourable to the assesses has increased the economic cooperation, trade and investment by reducing the burden of taxation. So far as it relates to relief from double taxation under DTAA falling under Section 90 of the IT Act, 1961 the decision of the SC makes it amply clear in *Azadi Bachao Andolan case* that the same income need not be taxed in both the countries before being considered for relief from double taxation under the DTAA.

References

1. Double Taxation Avoidance Agreements of different Countries
2. The Income Tax Act, 1961
3. Santhanam R., *Handbook on Double Taxation Avoidance Agreements & Tax Planning for Collaborations,* (6th Edn. 2004), Commercial Law Publishers India Pvt. Ltd., Delhi.
4. Rajaratnam S., Venkataramaiah B.V., *Commentary on Double Taxation Avoidance Agreements,* (3rd Edn. Part I 2007), Snow White Publication Private Ltd., Mumbai.
5. Vogel Klaus, *Double Taxation Convention,* (1990), Kluwer Law & Taxation Publishers, Deventer.
6. Shah Pradeep S., Kadakia Rajesh S., *Taxman's Master Guide to Income Tax Act,* (1990), Taxman Publications Private Ltd., New Delhi.
7. Mittal D.P., *Taxman's Indian Double Taxation Agreements & Tax Laws,* (4th Edn. Vol. I 2004), Taxman Publications Private Ltd., New Delhi.
8. Ahuja Girish, Gupta Ravi, *Practical Approach to Income Tax,* (2009-10), Bharat Law House Pvt. Ltd., New Delhi.
9. Patel Dhanshyam, Basic Concept of Double Taxation Avoidance Agreements, Taxman Tax Reports, vol. 108, 2000.
10. Ramanujam T.C.A., Double Taxation Avoidance Agreements- Need for Fresh Look, CTR, vol. 192, 2004.
11. Natarajan Sarayu, Double Taxation And Indo-Malaysian Double Taxation Avoidance treaty: A study in the Light of P.V.A.L. Kulandagan Chettiar's case, CTR, vol. 192, 2004.
12. Santhanam R., Limit for Double Taxation Relief under DTAA, vol. 198, 2005.
13. Ramanujam T.C.A., Double Taxation Avoidance Agreement, CTR, vol. 182, 2003.
14. Santhanam R., Double Taxation Relief Under Treaties, CTR, vol. 186, 2004.
15. Diljeet Titus and Clinton Johnston, India- Mauritius: Avoiding Double Taxation, 2006 (http://www.asialaw.com/Article/658317/Article.html) visited on 12.08.2011.
16. www.manupatra.com
17. www.legalsutra.org
18. www.lawkhoj.com
19. www.asialaw.com
20. www.jstore.

5/6/2014