IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "I" BENCH, AHMEDABAD

[Coram: Pramod Kumar AM and Rajpal Yadav JM]

ITA No.933/Ahd/2013
Assessment year: 2009-10

Bhavin A Shah ....**Appellant**
22, Amarkadamb Society
Ramdev Nagar Road, Satellite
Ahmedabad 380 015 [PAN: AYIPSS5534P]

Vs.

Assistant Commissioner of Income Tax
Circle 14, Ahmedabad ....**Respondent**

Appearances by:
Sanjay R Shah *for the appellant*
Vinod Tanwani *for the respondent*

Date of concluding the hearing : January 18 2017
Date of pronouncing the order : March 29, 2017

O R D E R

Per Pramod Kumar AM:

1. By way of this appeal, the assessee appellant has challenged correctness of order dated 1st January 2013 passed by the learned CIT(A), in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 2009-10.

2. Ground no. 1 is general and it does not call for any specific adjudication. It is dismissed as such.

3. In ground no. 2, the appellant has raised the following grievances:

> ***2. The learned Commissioner of Income Tax (Appeals) erred in law and on facts in confirming the disallowance of portfolio management expenses and interest charges (called as safeguarding charges) amounting to Rs.1,79,506 claimed deductible under section 57 of the Act.***
>
> ***2.1 The learned Commissioner of Income Tax (Appeals) erred in law and on facts by holding that the portfolio management expenses and interest charges incurred have no nexus with the overseas dividend and interest income.***

Alternatively and without prejudice to ground number 2 and 2.1, the portfolio management expenses and the interest charges amounting to Rs.1,79,506 should have been allowed as deductible expenses from the overseas capital gains income offered to tax under the head "Capital Gains" by the learned CIT(A). The learned CIT(A) failed to consider this alternative ground taken before him.

4. The appellant is an individual, resident in India, and is in employment of JP Morgan India Pvt Ltd as Managing Director and Global head of technology research of the company. He had entered into transactions for sale and purchase of various foreign securities and the income arising from such transactions was offered to tax as capital gains. These transactions are said to have taken place through non discretionary trading accounts maintained in this regard with the portfolio managers i.e. Credit Suisse (Zurich and Singapore branch) and UBS (Singapore branch). The assessee had also offered to tax income from interest and dividend on these securities. During the relevant previous year, the assessee had incurred total management expenses of Rs 6,37,828 and he claimed a deduction, of 25% of expenses so incurred i.e. Rs 1,59,459, on account of, as portfolio managers termed it, 'safeguarding expenses' and of Rs 20,046 on account of interest paid to the portfolio managers. It was also explained that since income from dividends and interest arising from these securities is duly offered to tax, these expenses are admissible as deductions. The Assessing Officer declined the claim, and, while doing so, observed as follows:

> *"4. In the return of income the assesses has claimed expenses under section 57 of the IT. Act amounting to Rs.1,79,506/-. The assessee was asked to submit details and evidence of expenses claimed along with justification for claim. The assessees vide submission dt. 20.12.2011 submitted copy of advices issued by 'Credit Suisse' towards safe custody charges for securities. The expenses u/s.57 are allowable only if it is laid out or expended wholly and exclusively for the purpose of making or earning such income. In the assessee's case the expenses claimed has no connection/nexus with the income earned. The assessee has also not submitted any justification for the same. In view of the same, expenses claimed u/s.57 amounting to Rs.1,79,506/- are disallowed and added to the total income."*

5. Aggrieved, assessee carried the matter in appeal before the CIT(A). It was submitted by the assessee that entire expenses, on account of fees paid to portfolio managers, was deductible, as a measure of abundant caution, the assessee has claimed only 25% of these expenses. The assessee also furnished evidences of fees paid to the portfolio managers. However, when a remand report was called from the Assessing Officer in respect of these submissions, the Assessing Officer is said to have stated that "expenses were incurred for earning of income but 25% of total expenses is hypothetical and on the higher side considering the nature of

transactions". It was in this backdrop that the CIT(A) also rejected the claim of the assessee. His line of reasoning, for doing so, was as follows:

> *'6.3 I have carefully perused the assessment order, the remand comments and also the counter comments offered by the appellant. The AO in the assessment order has pointed out that the expenses claimed must have connection or nexus with the income earned. Subsequently, in the remand proceedings, the AO, on the basis of letter filed from Credit Suisse, has agreed that such expenses might have been incurred by the assessee. However, the basis of claim made by the assessee @ 25% of the total expenditure is not explained. The assessee himself has admitted that he has claimed 25% of the total expenses being the expenses in relation to the income earned by him. In this context, the narration of expenses by the Credit Suisse is noticeworthy. The Credit Suisse has termed these expenses as 'safeguarding expenses'. The nexus or connection with the income as pointed out by the AO remained unanswered, even at the appellate stage. I am of the view that mere certificate from Credit Suisse will not entitle the appellant to make a arbitrary claim of expenses @ 25% of the total amount paid. Accordingly, the action of the AO in making an addition of Rs.1,79,506/- is confirmed."*

6. The assessee is aggrieved and is in further appeal before us.

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

8. We find that there is no dispute, as evident from the stand taken by the Assessing Officer in remand report and as recorded by the CIT(A) in paragraph 6.2 of his order, that "expenses were incurred for earning of income but", the objection of the Assessing Officer was that "25% of total expenses is hypothetical and on the higher side considering the nature of transactions". Once it is an undisputed position that the expenses were incurred for earning of income, the mere fact that the expenses are high or that the expenses are claimed only in part cannot be reason enough to make the disallowance. We have noted that the related securities were held by Credit Suisse and UBS and that these entities have charged the assessee for "safekeeping of securities……and their administration". The copies of invoices, as also letter confirming the charges, are filed before us, and we find no infirmities in these documents. The expenses so incurred by the assessee are in the nature of expenses incurred on portfolio manager. As the expenses so incurred by the assessee admittedly related to the safekeeping and administration of securities in question, income from which has been offered to tax by the assessee, we do not find any reason to disallow the partial claim of the assessee to the extent of 25%, as claimed, of the expenses so incurred by the assessee. The Assessing Officer has not brought on record any material to establish, or even indicate, that the claim of 25% , or for that purpose even any part of these expenses, is inadmissible. If the

expenses are on the higher side, that does not imply the expenses are fictitious or inadmissible. There is reasonable evidence of the expenses having been incurred as copies of related bank documentation is placed on record before us. When the assessee is earning income from foreign securities held by its portfolio managers abroad, and duly offering it to tax as 'income from other sources', the safekeeping and administration fee, paid in respect of such securities to its portfolio managers, cannot be declined deduction under section 57(iii). The nexus between earning of dividend and interest income and incurring of these expenses is clear, and since, in our opinion, these expenses are incurred for the purposes of earning income taxable as 'income from other sources', the deduction for expenses is duly admissible under section 57(iii) of the Act. We, therefore, uphold the plea of the assessee. The Assessing Officer is, accordingly, directed to grant deduction of Rs 1,79,506.

9. Ground no. 2 is thus allowed.

10. In ground no. 3, the assessee has raised the following grievances:

> ***3. The learned Commissioner of Income Tax (Appeals) erred in law and on facts in disallowing relief by way of tax credit amounting to Rs.3,72,698 claimed deductible u/s 90 of the Act in respect of the dividend income earned outside India.***
>
> ***3.1. The learned Commissioner of Income Tax (Appeals) erred in law as well as on facts in disallowing the relief by way of tax credit claimed under section 90 in accordance with the DTAA between India and USA in respect of the foreign taxes withheld from the overseas dividend income solely on the ground that the evidences do not bear the name of the appellant and are not signed by appropriate person from Credit Suisse/issuing authority defying the evidentiary value of the same. It is submitted that it be so held now and credit for Rs 3,72,698 as claimed by the appellant be granted to him.***
>
> ***3.2. The learned Commissioner of Income Tax (Appeals) erred in law as well as on facts by accepting the overseas dividend income from the evidences furnished by the appellant but not the figures of the foreign taxes withheld from the same thereby only partly accepting the evidentiary value of the furnished statements.***
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> ***3.3. Without prejudice to the above, the appellant contends that in case the evidences submitted are not perceived to be authentic, the***

overseas dividend income shall also be reduced from the taxable income of the appellant.

11. During the course of scrutiny assessment proceedings, the Assessing Officer declined the tax credit claim of the assessee, in respect of tax of Rs 3,72,698 deducted from its dividend earnings in the United States, on the ground that “relief will be available on actual payment made in the return of income filed in USA and tax paid thereon” and that “tax credit cannot be given on simply TDS deducted from foreign dividend income”. Aggrieved, assessee carried the matter in appeal before the CIT(A) but without any success. It was explained by the assessee that he is ‘resident’ in India for this assessment year, and that even his income earned in USA is subject to tax in his hands. There is thus double taxation of the US dividend income- in US as also in India, and the assessee is, therefore, entitled to relief from double taxation under article 25 of India United States Double Taxation Avoidance Agreement [(1991) 187 ITR (St) 102; Indo US tax treaty, in short]. None of these submissions, however, impressed the learned CIT(A). He confirmed the action of the Assessing Officer and declined to interfere in the matter. He also noted that some of the evidences donot bear the name of the appellant, are not signed by responsible persons from Credit Suisse or the authority issuing these evidences. It was also noted that the taxes withheld in US work out to almost 30% of the gross receipts. The assessee is not satisfied by the stand so taken by the CIT(A) as well, and is in further appeal before us.

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

13. We find that, at page 59A of the paper-book, the assessee has given details of the dividend earnings from its foreign securities and the taxes withheld from these earnings. As long as the assessee has shown all these incomes in his income offered to tax, the tax credits are also be granted in respect of the taxes withheld in the United States. As to the manner in which tax credits are to be computed, we find guidance from the text of art. 25(2)(a) of the Indo-US DTAA which is as follows :

> **"Where a resident of India derives income which, in accordance with the provisions of this Convention, may be taxed in the United States, India shall allow a deduction from the income of that resident an amount equal to income-tax paid in the United States, whether directly or by way of deduction. Such deduction shall however not exceed that part of income-tax (as computed before the deduction is given) which is attributable to the income which is taxed in the United States”**

14. So far as the rates at which dividend income of resident of India can be brought to tax, in accordance with Indo US tax treaty, we find guidance from article 10 of the said tax treaty which is as follows:

ARTICLE 10- Dividends

1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident, and according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed :

(a) 15 per cent of the gross amount of the dividends if the beneficial owner is a company which owns at least 10 per cent of the voting stock of the company paying the dividends;

(b) 25 per cent of the gross amount of the dividends in all other cases.

Sub-paragraph (b) and not sub-paragraph (a) shall apply in the case dividends paid by a United States person which is a Regulated Investment Company. Sub-paragraph (a) shall not apply to dividends paid by a United States person which is a Real Estate Investment Trust, and sub-paragraph (b) shall only apply if the dividend is beneficially owned by an individual holding a less than 10 per cent interest in the Real Estate Investment Trust. This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

3. The term "dividends" as used in this Article means income from shares or other rights, not being debt-claims, participating in profits, income from other corporate rights which are subjected to the same taxation treatment as income from shares by the taxation laws of the State of which the company making the distribution is a resident; and income from arrangements, including debt obligations, carrying the right to participate in profits, to the extent so characterized under the laws of the Contracting State in which the income arises.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting State, carries on business in the other Contracting State, of which the company paying the dividends is a resident, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the dividends are attributable to such permanent establishment or fixed base. In such case the provisions of Article 7 (Business profits) or Article 15 (Independent personal services), as the case may be, shall apply.

5. Where a company which is a resident of Contracting State derives profits or income from the other Contracting State, that other State may not impose any tax on the dividends paid by the company except insofar as such dividends are paid to a resident of that other State or insofar as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment or a fixed base situated in that other State, nor subject the company's undistributed profits to a tax on the company's undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other State.

15. What follows from an analysis of these provisions of the Indo US tax treaty is this. As long as a person, resident in India in terms of the treaty provisions, has been taxed in respect of his dividend earnings in the United States, whether directly or by way of tax withholdings, in accordance with the provisions of article 10, the tax credit will be available to him, against his tax liability in India in respect of such dividend income, subject to the condition that such tax credit will not exceed the Indian income tax liability in respect of the income in question. As we deal with this aspect of the matter, it is also essential to bear in mind the fact that in order to avail the treaty benefits, it is not sufficient that the assessee is a ‘resident’ of India under the Income Tax Act. The assessee is also required to satisfy the requirements of Article 4 for being termed as ‘resident of a contracting state’, i.e. India. In order to grant the tax credit, therefore, the Assessing Officer has to first examine whether the assessee is a resident of India under article 4 of the Indo US tax treaty, that amounts shown as dividends are actually in the nature of dividends, that US tax withholding is in accordance with the provisions of article 10, and, if that be so, grant a foreign tax credit for the amount of such tax withholding or Indian tax liability in respect of the related income- whichever is less. In case the US tax actually levied is in excess of the rate specified under article 10, the amount eligible for tax credit will remain confined to the amount computed on the basis of the rate prescribed under the Indo US tax treaty.

17. The assessee has filed detailed paper-book before us which has supporting evidences for tax withholding and the bank advices. These details were also filed before the CIT(A), the CIT(A) called for a remand report on the same but did not deal with the specifics of the matter beyond making generalized observations to the effect that "some" of these tax withholding certificates did not mention the name of the assessee or were not signed by responsible persons. These objections are too vague and too generalized. In any case, one of things noticed during the hearing was that though the assessee has filed these details, there are some apparent inconsistencies. We find, for example, that clearly the aggregate of these tax withholdings is much more than 25% of US dividend income, which, according to the provisions of Indo US tax treaty, is the maximum permissible tax withholding under article 10. When we pointed out the above inconsistency to the learned counsel for the assessee, learned counsel for the assessee did accept that the tax credit claim is almost 30% of the amount of related dividend earnings, but submitted that the tax credit may be restricted to 25% only.

18. The course of action suggested by the learned counsel does seem an easy option but it will not be a judicially correct option. There is no scope of sweeping generalizations while computing tax credit. The tax credit computation is to be done on a case to case basis, dealing with the tax levied in the other contracting state (i.e. US) and the income in respect of which such tax is levied. As for 25% tax withholding from US dividend income, it is not the applicable withholding rate but the maximum tax withholding rate. It is, therefore, not essential that the entire US tax levy in respect of dividend income is @ 25% only. As a corollary to the this position, the actual admissible withholding under article 10 is bound to be an amount lower than 25% because in some of the cases, the applicable US tax rate could even be 15%. These factors apart, in the case before is, there are some tax deductions at rates other than 15% and 25%. For example, in the case of Vanuguard, at page 59A of the paper-book filed before us, the tax withholdings are @ 20%. The tax credit in respect of this tax withholding- as also other similarly placed securities, therefore, cannot be more than 20% of dividend income in any event, even though the basis of 20% tax withholding is not at all clear. It is also not clear which are the cases in which tax withholding rate is 10% and in which cases the tax withholding rate is 25%. While computing the admissible tax credits, all these aspects need to be examined including whether the characterization of income as dividend is correct, so as to ensure correct tax credit computation. We are, therefore, not inclined to accept the learned counsel's suggestion for restricting the tax credit to 25% of the dividend income, nor do we think that it is proper to examine all these evidences, in detail, for the first time at the stage of proceedings before this Tribunal. In our considered view, all these issues and evidences should be examined properly at the stage of the Assessing Officer in accordance with the scheme of the Act as set out above. In our

considered view, the right course of action will be to remit the matter to the file of the Assessing Officer with the directions to compute the admissible tax credit in accordance with our observations above. The assessee is directed to furnish all the requisite evidence before the Assessing Officer, and will also be at liberty to raise such legal and factual issues as he may be advised to. The Assessing Officer will decide the matter afresh in accordance with the law, in the light of our observations above, by way of a speaking order and after giving yet another opportunity of hearing to the assessee.

19. Ground no. 3 is thus allowed for statistical purposes.

20. Ground no. 4 does not require any specific adjudication and is dismissed as such.

21. In the result, the appeal is partly allowed in the terms indicated above. Pronounced in the open court today on the 29th day of March, 2017.

Sd/- Sd/-

Rajpal Yadav **Pramod Kumar**
(Judicial Member) (Accountant Member)
Ahmedabad, the 29th day of March, 2017

Copies to: *(1) The appellant*
(2) The respondent
(3) Commissioner
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order

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Assistant Registrar
Income Tax Appellate Tribunal
Ahmedabad benches, Ahmedabad