

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**ITA No.428 of 2017 (O&M)
Date of Decision :09.07.2019**

The PR. Commissioner of Income Tax, Gurgaon

.....Appellant

Versus

EGL Eagle Global Logistics (India) Pvt. Ltd.

..... Respondents

**CORAM: HON'BLE MR.JUSTICE KRISHNA MURARI, CHIEF JUSTICE
HON'BLE MR.JUSTICE ARUN PALLI, JUDGE**

Present : Mr. Tajender K. Joshi, Advocate for the appellant.

Mr. Kamal Swahney, Advocate with
Mr. Prashant Meharchandani, Advocate and
Mr. Abhivadya Sood, Advocate for respondent.

KRISHNA MURARI, CHIEF JUSTICE (Oral):

Heard learned counsel for the parties.

Following substantial question of law arises for adjudication in
this appeal:-

**“Whether, on the facts and in the circumstances
of the case, the Hon'ble ITAT was right in law in deleting
the disallowance of Rs.3,63,95,888/- made by the Assessing
Officer as the Tax Deducted at Source should have been
deducted since the amount paid by the assessee to its parent
company attracted provisions of Section 40(a)(ia) read with
Section 9(1)(vii)”.**

Learned counsel appearing for respondent-assessee contends
that in view of the existence of a double taxation avoidance agreement
which is available to the recipient entity based in United States of America,

the income is not chargeable to tax in India in view of Section 90(2) of the Act which read as under:-

“Where the Central Government has entered into an agreement with the Government of any country outside India under 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”.

In view of Section 90(2) of the Act and clause 4(b) of Article 12 of the Treaty, the provisions of this Act would stand applicable only where fees for included services taxable only if there is a make available technical knowledge. In the case in hand finding of fact that has been returned by the ITAT, there is no make available of the technical knowledge, therefore, the provisions of the Income Tax Act would not stand attracted in the transactions in question. The issue stands squarely covered by the decision of the Hon'ble Apex Court in the case of **Union of India Vs. Azadi Bachao Andolan (2003) 132 Taxman 373 (SC)**, wherein in paragraph 26, it has been observed as under:-

“A survey of the aforesaid cases makes it clear that the judicial consensus in India has been that [section 90](#) is specifically intended to enable and empower the Central Government to issue a notification for implementation of the terms of a double taxation avoidance agreement. When that happens, the provisions of such an agreement, with respect to cases to which where they apply, would operate even if inconsistent with the provisions of the [Income-tax](#)

Act. We approve of the reasoning in the decisions which we have noticed. If it was not the intention of the legislature to make a departure from the general principle of chargeability to tax under section 4 and the general principle of ascertainment of total income under section 5 of the Act, then there was no purpose in making those sections "subject to the provisions" of the Act. The very object of grafting the said two sections with the said clause is to enable the Central Government to issue a notification under section 90 towards implementation of the terms of the DTAs which would automatically override the provisions of the Income- tax Act in the matter of ascertainment of chargeability to income tax and ascertainment of total income, to the extent of inconsistency with the terms of the DTAC”.

It is also undisputed that a notification under Section 90 towards implementation of the terms of the DTAs has been issued by the Central Government, in the case in hand.

In view of the above, the question as raised for adjudication is answered in negative and the appeal accordingly fails and stands dismissed.

(KRISHNA MURARI)
CHIEF JUSTICE

(ARUN PALLI)
JUDGE

09.07.2019

Manoj Bhutani

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No