CASE NOTE

Case Name: Benteler Automotive (China) Investment Limited V. Assistant Commissioner of Income-tax (IT) & Ors.

Citation: 2026 LLBiz HC(BOM) 172

Case Number: WP/11074/2025

Date of Decision: 27.03.2026

Court: Bombay High Court

Coram: B. P. Colabawalla & Amit S. Jamsandekar, JJ.

Introduction

The Writ Petition bearing the name "Benteler Automotive (China) Investment Ltd. V. Assistant Commissioner of Income-tax (IT) & Ors.", moved before the High Court of Bombay under Article 226 of the Constitution arises due to rejection of the application of 'NIL withholding tax' certificate under section 197 of the Income Tax Act, 1961 (IT Act, 1961) by the Assessment Officer as the Petitioner company is incorporated and tax resident in China, contending that since the services rendered entirely from China to India, the income should not be taxed in India as 'fees for technical services' (FTS) does not fall within the ambit as defined in Article 12(4) of the India-China Double Taxation Avoidance Agreement (DTAA).

Facts

The Petitioner company, Benteler Automotive (China) Investment Ltd., is incorporated under the laws of China and a resident of China, provides management support services, finance and human resources services, quality system and warranty management services, information technology support services, facility management services, technical support on treasury, taxation, legal and internal control and other related services to its Indian subsidiary, Benteler India Private Limited (Benteler India) along with related parties in the Asia Pacific region. Any payment made by Benteler India to the Petitioner for supply of such technical services would be taxed in India under section 9(1)(vii) of the Income Tax Act, 1961.

The Petitioner charged Benteler India a service fee equal to the cost incurred by it with a mark-up of 5%. Payments were made periodically by Benteler India after 'Tax Deducted at Source' (TDS) at the rate of 10% under section 195 of the IT Act, 1961 read with India-China DTAA. The total payments amounted to approx. Rs. 3.33 crores (Rupees three crores and thirty-three lakhs), on which the TDS of around Rs. 33.31 lakhs (Rupees thirty-three lakhs and thirty-one thousand) was deducted. As reported by the Petitioner, it has no Permanent Establishment in India as specified in Article 5 of the DTAA, and hence, isn't liable to pay any tax in India for the technical services provided to Benteler India.

Thereafter, the Petitioner applied for a 'NIL withholding tax' certificate under section 197 of the IT Act, 1961, arguing that its income was not taxable under Article 12(4) of India-China DTAA since the services were not physically rendered in India. The application was rejected

by the Assessing Officer noting that the petitioner was liable for tax in India for at least previous four assessment years. Therefore, the Petitioner filed this petition seeking a declaration that the consideration received/ receivable by the Petitioner from its Indian subsidiary, Benteler India, in accordance with the Service Agreement entered into between them isn't taxable in India.

Issues

1. Whether the sum received by the Petitioner from Benteler India qualifies as FTS under Article 12(4) of the India-China DTAA?
2. Whether the Petitioner is entitled to 'NIL withholding tax' Certificate under section 197 of the IT Act, 1961, and whether such rejection of application by the Assessing Officer was valid?
3. Whether technical services be rendered physically in India within the scope of FTS under DTAA, or outside India?
4. Whether the Petitioner being a non-resident with no Permanent Establishment in India, be liable to tax in India?

Arguments

Petitioner

The Petitioner argued that being a tax resident of China, taxation of income earned by it is governed under Article 12(4) of India-China DTAA providing that FTS arising in India and paid to a resident of China may be taxed in China as no personnel of the Petitioner have come to India for rendering the abovementioned technical services.

Mr. Sridharan, the Ld. Senior Counsel on behalf of the Petitioner submitted that the income in question does not satisfy the definition of FTS contained in Article 12(4) of the India-China DTAA and hence is not taxable under the said DTAA. It was also argued that the Petitioner has no Permanent Establishment in India under Article 5 of the India-China DTAA, therefore, the services do not qualify as FTS, and if at all taxed, the provisions of the India-China DTAA are more beneficial to the Petitioner.

The Petitioner also submitted that FTS, most of India's DTAAs provided for taxation in India if the payer is in India. The exception to this rule is in the India-China, India-Israel, and India-Finland DTAAs. In these treaties, provision of services in India is a further essential criterion. Therefore, the condition relating to performance of services in India, is forming part of the source rule contained in Article 13(5) of the India-Israel DTAA, and Article 12(5) of the India-Finland DTAA.

Respondent

The learned councils for the Respondents submitted that this is not a case in which the Writ Court ought to exercise its extraordinary and discretionary writ jurisdiction or go into the question of interpretation of the India-China DTAA at this stage as the admitted factual position in this case negates the very grounds raised by the Petitioner and hence the Petition ought to be

dismissed on this basis alone. Along with this, they submitted that the Certificate issued under the section 197 of the IT Act, 1961, is a provisional Certificate and the assessment proceedings are still to take place.

The Respondents also relied upon Rule 28AA of the Income Tax Rules, 1962, as the declaration sought by the Petitioner cannot be granted in the present petition by the Respondents as the very issue is pending not only before the Income Tax Appellate Tribunal (ITAT), but also before the Commissioner of Income Tax (CIT) [Appeals] as giving such declaration would directly impact abovementioned proceedings.

The Respondents proclaimed that since the technical services were rendered through video conferencing, emails and conference calls, the interaction would amount as physical rendition of services in India and such services will not be covered within the ambit of Article 12(4) of tax treaty as FTS. The Assessing Officer denied the Petitioner any refund amongst other things relying upon the decision of the ITAT.

Court's Reasoning and Analysis

The challenge to assessments is still pending before the ITAT and would directly interfere with the same. The court was of the view that the Assessing Officer correctly rejected the application which was filed by the Petitioner seeking a 'NIL withholding tax' Certificate. The court also pointed out that higher authorities other than the Assessing Officer have already ruled that payment made by the Benteler India to the Petitioner for the services rendered is taxable in India.

The authorities CIT (Appeals) or Dispute Resolution Panel both being higher than the Assessing Officer already ruled that payments made by Benteler India to the Petitioner would be taxable in India for at least three previous years and the same would be taken into consideration.

Final Decision and Order

The court held that exercising its extraordinary writ jurisdiction for no interference under Article 226 of the Constitution of India to give a declaration on taxability would directly interfere with the pending appellate proceedings. Consequently, the court left it open for the parties to canvass all arguments regarding the interpretation of the India-China DTAA before the ITAT.

The High Court of Bombay dismissed the writ petition and upheld the Assessing Officer's order rejecting the NIL withholding tax certificate application. The court declined to issue any declaration regarding the taxability of the services under the India-China DTAA, directing the parties to pursue their remedies before the ITAT where the appeals are currently pending.

Analysis

The first argument canvassed on behalf of the Respondents is that even assuming for the sake of argument that services to be rendered by the Petitioner are to be physically rendered in India,

even then, the facts would clearly establish that services were physically rendered in India. This argument at first appears to be attractive, but does not carry much substance. Though the services were rendered to the Indian entity virtually, would not mean that the services were physically rendered in India by the Chinese entity as the same could be equally argued that the Indian entity received those services in China.

The Respondent being in an undisputed position that in the case of the very Petitioner, for at least four previous Assessment Years, fees paid to the Petitioner for providing the technical services by Benteler India, were taxed in India. Therefore, the sum received by the Petitioner from Benteler India qualifies as FTS under Article 12(4) of the India-China DTAA, and TDS at the rate of 10% amounting to approximately Rs. 33.31 Lakhs (Rupees thirty-three lakhs and thirty-one thousand only) was deducted on the total sum for the period April 2025 to July 2025.

The next question to be decided is whether the Assessing Officer correctly rejected the application filed by the Petitioner under section 197 of the IT Act, 1961 for issuance of 'NIL withholding tax' Certificate. It was held that, in case of any income of any person, or sum payable to any person, income-tax is required to be deducted at the time of credit, or at the time of payment at the rates in force under the provisions of IT Act, 1961, the Assessing Officer is satisfied that the total income of the Petitioner justifies the deduction of income-tax at any lower rate or no deduction of income-tax, give the assessee (here Petitioner) such Certificate, as maybe appropriate. Sub-rule (1) of Rule 28AA clearly stipulated that existing and estimated tax liability of a person justifies the deduction of tax at a lower rate, or no deduction of tax, as the case may be, the Assessing Officer has to take into consideration is the tax payable on the assessed or returned income, as the case may be, of the last three previous years.

The Petitioner being dependent on the case of Ashapura Minichem Limited (40 SOT 220), the court held that all the aspects of FTS as defined under Article 12(4), additionally to arise within the meaning of Article 12(6). Both these conditions have to be cumulatively satisfied for the concerned fee to be taxed in India under India-China DTAA which have been overlooked in Ashapura's case by the ITAT.

Other reliance placed by the Respondents on the judgements was found to be of no assistance to the Respondents by the High Court of Bombay, but in the case of Praful B. Desai, the question for consideration before the Hon'ble Supreme Court was whether in a criminal trial, evidence can be recorded by video conferencing. It was opined that there was a difference between virtual reality and video conferencing, stating that video conferencing has nothing to do with virtual reality and that it was distinguished noting they pertained to criminal procedure and access to justice, and could not be imported to determine the place of rendition of technical services under a bilateral tax treaty.