In Re: Dhv Consultants Bv

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Court : Authority for Advance Rulings

Decided On : Jul-15-2005

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Judge : S S Quadri, K Singh, A Narang

Appellant : In Re: Dhv Consultants Bv

Judgement :

Syed Shah Mohammed Quadri, J. (Chairman), K.D. Singh and A.S. Narang, Members For Appellant/Petitioner/Plaintiff: Sohrab Dastur and Niraj Sheth, Advs.

Income Tax Act, 1961 - Sections 2(24), 4, 10(6), 28 to 44C, 44D, 52(1), 52(2), 57, 90, 115A, 115A(1), 115A(3), 206C and 245Q(1); Finance Act, 1975; Income Tax Act, 1922 In Re: Stanley Keith Kinnett, (1999) 238 ITR 155 (AAR); Karamat Khan v.CIT, (1965) 58 ITR 642 (All); Tirunelveli Motor Bus Service Co. (P) Ltd. v. CIT, (1970) 78 ITR 55 (SC); Union of India and Anr. etc. etc.

v. A. Sanyasi Rao and Ors. etc. etc., (1996) 219 ITR 330 (SC); CIT v.Sir S.M. Chitnavis, (1932) 2 Comp Cas 464 : (1932) 6 ITC 453 (PC); K.P.Varghese v. ITO and Anr., (1981) 131 ITR 597 (SC); Union of India and Anr. v. Azadi Bachao Aandolan and Anr., (2003) 263 ITR 706 (SC); In Re: Lloyd Helicopters International Pty. Ltd., (2001) 249 ITR 162 (AAR); In Re: Cyril Eugene Pereira (1999) 239 ITR 650 (AAR) 1. In this application under Section 245Q(1) of the IT Act, 1961 (for short 'the Act'), DHV Consultants BV (hereinafter referred to as Dutch BV) is the applicant. The applicant is a foreign company incorporated in

Netherlands and is engaged in the business of providing consultancy services in the areas of highways, transportation, water supply and waste water, urban development, environment, agricultural, natural resources, etc. Dutch BV has set up several Project Offices in India (hereinafter collectively referred to as 'the PCs') to carry out its activities in India. Dutch BV, through the POs, is currently providing consultancy services to National Highways Development Projects, Delhi Water Supply and Sewerage Project, etc. being executed in India. The POs derive income in the nature of fee for technical services from India. The income of the company is taxed on presumptive basis under Section 44D read together with Section 115A of the IT Act, 1961 (the Act). Dutch BV sends its employees from Netherlands to India to work on various projects being executed by it in India. During their stay in India the employees continue to receive salary and allowances in the home country. Since Dutch BV in its capacity of an employer, is under an obligation to deduct taxes at source in India to the extent its employees' salary is subject to tax in India, it is keen to know with certainty its liability towards taxes to be deposited on behalf of its employees. That the salary paid to an individual either in India or outside India in respect of services rendered by him in India will be chargeable to tax in India. However, in case an individual is also liable to pay taxes in his country of residence with which the Government of India has signed a Double Taxation Avoidance Agreement (DTAA) in accordance with Section 90 of the Act, then the provisions of the DTAA may be made applicable to such individual, in case the provisions of the DTAA are more beneficial to him.

It is, therefore, stated that according to the provisions of DTAA between India and Netherlands, where the employee is a resident of Netherlands as per the DTAA, remuneration paid to him for employment exercised in India would be exempt from tax in India if all of the following conditions as specified in Article 15 (Dependent Personal Services) of the DTAA are satisfied : The total duration of his stay (in aggregate) in India does not exceed 183 days in a tax year (April 1 to March 31); The remuneration for services rendered by the employee is paid by, or on behalf of, an employer who is not a resident of India; and The remuneration is not borne by a PE or fixed base, which the employer has in India.

Based on the above facts, the applicant desires the determination of the question which is as under : "Whether the condition specified under Sub-clause (c) of Clause 2 Article 15 of DTAA between India and Netherlands is satisfied when Dutch BV is taxed in India based on the provisions of Section 44D and Section 115A of the Act ?" 2. The jurisdictional CIT in his written submissions has stated that the applicant sends its employees from Netherlands to India to work on various projects being executed in India. During their stay in India the employees continue to receive salary and allowances in Netherlands.

The employees are assured of "net of taxes" salary and the entire tax liability of the employees in India is borne by the applicant. The applicant in its capacity of an employer, is under an obligation to deduct taxes at source in India to the extent its employees' salary is subject to tax in India. The salary paid to an individual either in India or outside India in respect of services rendered by him in India will be chargeable to tax in India. However, in case an individual is resident of a country with which Government of India has signed a DTAA in accordance with Section 90 of the Act, then the individual is entitled to claim benefit under the provisions of the DTAA. However, no evidence has been given regarding the residence of these employees in Netherlands and their liability to tax in that State. There is nothing on record to demonstrate that these employees are liable to tax both in India and Netherlands. The benefit of Section 90 of the Indian IT Act cannot be availed of if the taxpayer pays tax or is liable to pay tax under the law in force in one country alone. This view has been held by the Authority for Advance Rulings in the case of Cyril Eugene Pereira, In re (1999) 239 ITR 650 (AAR). That the applicant has further stated that the condition under Sub-clause (c) of Clause 2 of Article 15 of the DTAA is satisfied in its case, since it is taxed on presumptive basis under Section 44D read with Section 115A of the Indian IT Act.

The contention of the applicant is that, since it is liable to tax as prescribed under Section 115A on its gross receipts, none of the expenses incurred by it for its Indian operations are deductible in computing the taxable profits in India. That, since the salary paid by it to its employees in Netherlands is not deductible while computing the taxable profits in India, such remuneration cannot be treated to have been 'borne by' the PE of the applicant in India and hence the condition prescribed in Sub-clause (c) of Clause 2 of Article 15 is satisfied in applicant's case. However, this view of the applicant is not correct since the concept of determination of taxable income under Section 44D read with Section 115A of the Indian IT Act cannot be considered to exclude the expenses attributable to such income (including remuneration paid to employees) as non-deductible merely because the statute fixes a percentage in this regard. The fixation of a rate of gross receipts as the net assessable profit only indicates statutory attempt at estimating the expenses normally incurred in such business [Lloyd Helicopters International Pty. Ltd., In re (2001) 249 ITR 162 (AAR)] 3. The learned counsel for the applicant pleaded that the word 'borne by' is not defined in the India-Netherlands DTAA. However, this term is also used in the corresponding provisions of the article on dependent personal services in OECD, UN and US Model Conventions. Accordingly, in order to understand the meaning of this phrase, reference may be made to international tax commentaries. That examination of these commentaries indicate that the remuneration is said to be 'borne by' a PE, if the same is deductible in computing the PE's taxable profits in the source country. Reference was made to the observations of the learned author Klause Vogel in his book 'Double Taxation Conventions' which states as under, at p. 902.3 : "Remuneration for dependent personal services is considered to have been borne by a PE or fixed base if it can be claimed as a deduction for business expenses when calculating the profits to be attributed to the establishment or base....

...Whether the PE actually bears the cost of remuneration is decisive, not whether it should have done so or whether the cost should have been attributed to it...." The learned counsel next referred to the dictionary meaning of the word 'borne by' which was as under : "Oxford Dictionary--Borne--Carried, sustained, endured, etc. Used attrib. Chiefly in such constructions as 'patiently borne injuries', 'the breeze-borne note'.

Black's Law Dictionary--Bear--To support, sustain, or carry; to give rise to, or to produce, something else as an incident or auxiliary.

To render, to manage, or direct, or to conduct, to carry on, or maintain; to be answerable for, and to defray".

It was stated by the learned counsel that in the present context the expression 'borne by' used in the DTAA is to be interpreted as to whether the remuneration paid by the employer in Netherlands, is deductible in computing the taxable profits of the PE in the source country (India) keeping in view the provisions of Sections 44D and 115A(3), which specifically stated that no deduction in respect of any expenditure or allowance shall be allowed under Sections 28 to 44C and 57 in computing the income by way of fees for technical services received after the 31 day of March, 1976. It was, therefore, pleaded by the learned counsel that in view of this blanket prohibition under the Act, it cannot be said that expenses incurred towards remuneration of employees and paid by the employers in Netherlands were deductible while computing the profits of the PE in the source country. For this purpose, the learned counsel placed reliance on the decision of the Hon'ble Authority in the cases of Stanley Keith Kinnett, In re (1999) 238 ITR 155 (AAR), Karamat Khan v. CIT (1965) 58 ITR 642 (All), Tirunelveli Motor Bus Service Co. (P) Ltd. v. CIT .

Referring to the case of Lloyds Helicopters (supra), Shri Dastur stated that the conclusion drawn by the Hon'ble Authority in that case did not appear to be in accordance with the law since in that case the income was taxable on presumptive basis and, therefore, it could not be said that remuneration paid to employees was deductible while computing the profits of the PE in the source country. It was therefore, pleaded that condition in the Clause 2(c) of Article 15 is fulfilled in the case of the applicant.

4. The learned counsel for the Revenue pleaded that, as already pointed out by the CIT in his report dt. 27th Oct., 2004, complete facts have not been stated in the application which would be required for considering the question of exemption from taxation in respect of remuneration paid to the employees. That the applicant has not clarified its position regarding first two conditions of Article 15(2) while seeking advance ruling in respect of the third condition. In this regard, it was clarified by the learned counsel for the applicant in the Court that visit of the

employees would be less than 183 days and the agreement entered with the source State were relevant to the period after 31st March, 1976, and before the 1st day of April, 2003. It was, therefore, pleaded that the ruling may be given on the basis of these facts. The factual position was also confirmed subsequently vide applicant's letter dt. 4th May, 2005. By another letter dt. 30th May, 2005, the applicant sought time to file written submissions in respect of legal issues by 13th June, 2005. However, these were filed later on 8th July, 2005.

In respect of question raised for advance ruling, it was pleaded by the learned counsel for the Revenue that the factum of presumptive taxation under Section 115A read with Section 44D of the IT Act, 1961, would not have any bearing on the deducibility of remuneration of the employees merely because the remuneration was paid by the employer in the other Contracting State, i.e., Netherlands. That interpretation of Section 44D and Section 115A of the IT Act, 1961, as made on behalf of the applicant is entirely misconceived and confusing and runs contrary to the settled legal position as enumerated by Hon'ble Supreme Court in the case of Union of India and Anr. etc. etc. v. A. Sanyasi Rao and Ors. etc. etc. . While considering the validity of Section 44AC and Section 206C, it was held by the Hon'ble Court that these two sections are only machinery provisions and not charging sections. The Hon'ble Court further held that presumptive assessment does not dispense with the regular assessment as provided in accordance with Sections 28 to 44C. The learned counsel also relied heavily on the decision of the Hon'ble Authority for Advance Ruling in the case of Lloyd Helicopters International Pty. Ltd., In re (supra) wherein it was held by the Authority that merely because the assessment is made on estimate basis would not mean that the expenses are not deductible.

Relying on the decision of the Privy Council in CIT v. Sir S.M.Chitnavis (1932) 2 Comp Cas 464 : (1932) 6 ITC 453 (PC), the Authority held that in computation of profits, all proper outgoings have to be allowed as deduction irrespective of whether the statute contains a specific provision in this regard in the Act. Therefore, salary paid to the employees and indeed all other revenue expenses incurred for running a business will have to be taken into account in determining its profits irrespective of the provisions of Section 28 to Section 43A. It was pleaded that this ruling is a direct authority on the issues raised in the present application and hence deserves to be followed. That the lower rate of tax prescribed under Section 115A for technical fees received and higher rate for income (other than royalty and fees for technical services) of a foreign company is clearly for allowing margin for the deduction of expenses which would, inter alia, include remuneration paid to employees working in India and that the salary of the employees who have rendered services in India is directly connected with and related to the business of the PE and such expenses incurred for earning the income are liable to be deducted for arriving at income of the PE in India. Merely because the payment is made by the employer in Netherlands would not in any manner affect the nature of its deductibility from the profits of the PE in India when the employment is exercised in the source country.

5. Before arriving at a conclusion, it would be appropriate to detail the provisions of Article 15 of the DTAA with Netherlands which deals with Dependent Personal Services. Article 15(1) states that salary, wages and other similar remuneration derived by a resident of one of the States in respect of an employment shall be taxable only in that State unless the employment is exercised in the other State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State. Sub-clause (2) of Article 15 prescribes three conditions which if fulfilled would allow exemption from taxation in the other State where employment is so exercised. For the sake of convenience the relevant provision is extracted hereunder : 1. Subject to the provisions of Articles 16, 18, 19, 20 and 21, salaries, wages and other similar remuneration derived by a resident of one of the States in respect of an employment shall be taxable only in that State unless the employment is exercised in the other State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.

2. Notwithstanding the provisions of para 1, remuneration derived by a resident of one of the States in respect of an employment exercised in the other State shall be taxable only in the first mentioned State if: (a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in the fiscal year concerned; and (b) the remuneration is paid by, or on behalf of, an employer

who is not a resident of the other State; and (c) the remuneration is not borne by a PE or a fixed base which the employer has in the other State." From the pleadings of the learned counsel for the applicant and the Revenue, it is seen that the agreed statement of facts in respect of Sub-clause (c) is that the expression 'borne by' means "deductible" or "liable to be deducted". Sub-clauses (a) and (b) are factual in nature and the position has already been clarified by the learned counsel for the applicant as stated supra. It is also seen that similar provision for taxing the income of individual who is not a citizen of India, are detailed in Section 10(6)(vi) of the Act, which is reproduced hereunder: "Income not included in total income.-- In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included-- (6)(vi) the remuneration received by him as an employee of a foreign enterprise for services rendered by him during his stay in India, provided the following conditions are fulfilled-- (a) the foreign enterprise is not engaged in any trade or business in India; (b) his stay in India does not exceed in the aggregate period of ninety days in such previous year; and (c) such remuneration is not liable to be deducted from the income of the employer chargeable under this Act;" The expression used in the Act "liable to be deducted" is an indicator of the legislative intent and assumes importance since the term "borne by" is not defined in the treaty and the meaning which it has under the Act becomes applicable in view of the provisions of Article 3(2) of the DTAA between India and Netherlands.

It is unnecessary to dilate this aspect further because Article 15(2)(c) is relevant to the question of taxability of the salaries of the employees of the applicant and the question under consideration relates to the taxability of the income (fees for technical services) of the applicant and not to the taxability of the income of the PE where the employees worked or the taxability of the salaries of the employees of the applicant.

6. It is contended by Shri Dastur for the applicant that, having regard to the type of assumption envisaged under Section 44D read with Section 115A, as in the present case, it cannot be said that such remuneration (as has been referred to above) or indeed any other sum in the nature of revenue expense is deducted or deductible in determining the taxable profits arising to the applicant from its base

or PE in India. He says that the section provides for a statutory determination of the taxable profit at a fixed percentage of the gross receipts, dispensing with the normal process outlined in Sections 28 to 44C and 57, and hence remuneration is not deductible in ascertaining the applicant's profits under these sections.

The interpretation of Section 44D and Section 115A of the Act as made on behalf of the applicant is entirely misconceived and runs contrary to the settled legal position. Presumptive taxation is an accepted method of taxation in tax jurisprudence the world over. In IT Act, 1961, a cluster of provisions like Section 44AC, Section 44AD, Section 44AE, Section 44AF, Section 44B, Section 44BB, Section 44BBA, Section 44BBB, Section 44C and Section 44D have been engrafted by the legislature from time to time by way of presumptive taxation so as to simplify the computation and enhance tax compliance. In Finance Bill, 1976, while introducing s. 44D, it was explained by the Government in the Notes on clauses accompanying the Bill: "Under the existing provisions of the IT Act, 1961, income chargeable to tax under the various heads is computed on a net basis, i.e., after allowing deduction for admissible costs and expenses. The determination of the taxable income on net basis in the case of non-resident taxpayers, however, creates practical difficulties. The non-resident taxpayer is not always sure of the type and extent of expenses which would be admissible under our tax laws and the nature of evidence which will be called upon to produce in support of his claim for expenses. ITOs are also handicapped as, in the absence of account books of the foreign taxpayer which are kept outside India, they are not in a position to carry out any worthwhile scrutiny of these claims.

A step towards simplifying and rationalizing the assessments of non-residents was taken last year when a special provision was made through the Finance Act, 1975, for computing the shipping profits in the case of non-residents. The Bill seeks to advance this process further by making special provisions for taxation of dividends, royalties and fees for technical services and for determination of head office expenses in the case of non-residents." Section 44D and Section 115A(1)(b) provide that income-tax payable by a non-resident or a foreign company would be 30 per cent of income by way of royalty and fees for technical services received in pursuance of an agreement made on or before 31st May, 1997, and 20 per cent in pursuance of agreement made after 31st May, 1997. Literally read, Section 115A(1)(b) brings about a legislative assessment of the tax on royalty and fees for technical services. The normally applicable provisions like Section 28 to Section 44C are dispensed with altogether. However, section 115A(1)(b) read with Section 44D is a computation provision and merely lays down a standard for measure of tax and does not negate the charging Section 4 in the IT Act. The scheme of the IT Act would indicate that tax has two elements, i.e., levy of tax and measure of tax. Levy of a tax is defined by its nature while the measure of tax may be assessed by its own standard.

Applying the principle aforesaid, it is clear that section 115A(1)(b) and Section 44D merely lay down the alternative computation of tax on royalty and fees for technical services. The decision of Supreme Court in Union of India and Ors. v. A. Sanyasi Rao and Ors. (supra) is a direct authority in support of the aforesaid view. While considering the validity of Section 44AC and Section 206C, it was held by the Supreme Court that these two sections are only machinery provisions and not charging sections. The Court further held that presumptive assessment does not dispense with the regular assessment as provided in accordance with Section 28 to Section 43C. That non obstante clause excluding the provisions of Sections 28 to 43C in Section 44AC were merely to facilitate the collection of revenue at the first point and would not exclude a regular assessment at the final stage in accordance with these sections.

7. Now, with regard to regular assessment in accordance with Sections 28 to 43C in case of foreign companies, Section 4 which is the charging section, provides that tax shall be charged for any assessment year as per rates prescribed in the Finance Act. For royalty and fees for technical services received by a foreign company in pursuance of an agreement made after 1st April, 1976, and before 31st May, 1997, tax payable on such income as per Section 115A is 30 per cent of gross receipts and for agreements made after 31st May, 1997, 20 per cent of such receipts. As against this portion, rates of tax for other income is much higher e.g., for asst. yr. 2004-05 being 40 per cent The lower rate of tax prescribed under Section 115A is clearly due to the fact that tax on such income is computed on gross basis whereas for other income (other than royalty and fees for technical

services) of a foreign company, tax is computed on net basis. Providing for lower rate of tax under Section 115A as compared with the rates prescribed in the Finance Act is clearly for allowing margin for the deduction of expenses which include remuneration paid to employees working in India.

Profits and gains of business connote excess of receipts over expenditure. Gross receipts cannot by any stretch of imagination be considered as income. This would be blatant negation of basic accounting principles as well as logic and commonsense. Accrual of revenues and cost is the most fundamental assumption of accounting standards which underlie preparation and presentation of financial accounts. Such fundamental premise is deeply ingrained in the Indian as well as International Accounting Standards. Laws of domestic taxation as well as tax treaties are invariably in consonance with such basic accounting concepts. Therefore, any attempt to treat gross receipts of technical fees as income without deducting expenses connected therein would run counter to the basic principle of accountancy as well as provisions of tax laws and tax treaties. In fact "income-tax" is a tax on income. It cannot be treated as a tax on gross receipts. Reference at this stage may be made to the celebrated decision of Hon'ble Supreme Court in the case of K.P. Varghese v. ITO and Anr.

wherein, while interpreting the provisions contained under Section 52(1) and Section 52(2) of the Act, it was held as under : "We must not adopt a strictly literal interpretation of Section 52, Sub-section (2), but we must construe its language having regard to the object and purpose which the legislature had in view in enacting that provision and in the context of the setting in which it occurs.

We cannot ignore the context and the collocation of the provisions in which Section 52, Sub-section (2), appears, because, as pointed out by Judge Learned Hand in the most felicitous language : '...the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create.' Keeping these observations in mind we may now approach the construction of Section 52, Sub-section (2).

The primary objection against the literal construction of Section 52, Sub-section (2), is that it leads to manifestly unreasonable and absurd consequences. It is true that the consequences of a suggested construction cannot alter the meaning of a statutory provision but it can certainly help to fix its meaning. It is a well-recognised rule of construction that a statutory provision must be so construed, if possible, that absurdity and mischief may be avoided.

There are many situations where the construction suggested on behalf of the Revenue would lead to a wholly unreasonable result which could never have been intended by the legislature." The above decision clearly supports the fact that Section 44D and Section 115A cannot be read as treating gross receipts of fees for technical services without allowing deduction on account of expenses incurred for earning the same as income, as defined under Section 2(24) of the Act.

8. The applicant has placed reliance on the ruling of AAR in the case of Stanley Keith Kinnett, In re (supra); the decision has been given on entirely different facts and issues involved, and therefore, is of not any assistance in the case of the applicant. As already stated, the applicant has raised in this application a purely legal issue regarding presumptive taxation as per Section 44D read with 115A. Whereas no such issue was involved in the Stanley's case, there taxability of the salary of the employees was in question. In that case, Stanley Keith Kinnett was an employee of Whirlpool Corporation USA, whereas he rendered services in India in the branch office of Whirlpool India Holdings for a short period of 76 days. The employer company reimbursed the salary paid by the Indian Branch Office. The American company had no PE in India and, therefore, there was no question of salary expenses being borne by PE of the employer in India. Reliance has also been placed on the decision of the Supreme Court in Tirunelveli Motor Bus Service Co. (P) Ltd. v. CIT (supra) and Karamat Khan v. CIT (supra).

The decision of Hon'ble Supreme Court relates to the question whether certain items can be treated as having been allowed or actually deducted in determination of the profits of the earlier years when the assessment made for that year was a best judgment assessment. Same is the position in respect of the case of Karamat Khan (supra) wherein it was held that the depreciation which has been actually allowed could alone be taken into consideration in computing the written down value for determining the excess chargeable as profits under the IT Act, 1922. Whereas in the present case we have to consider the import of the expression 'borne by' which, as stated earlier, means "deductible" and the emphasis, therefore, lies not on the factum of the actual deduction but on their deducibility, in principle, in the computation of the applicant's income. It is not possible to agree to the proposition that expenses in question (remuneration paid to employees) should be held not to be deductible merely because the assessment is made on presumptive basis. It cannot be overlooked that though the sections outline a statutory basis for assessment, what is being assessed is the "profits of the business", an expression which has to be understood in the commercial sense, and the opening words of the Section 44D make no difference to this concept. Admittedly, the applicant paid salaries of the employees in Netherlands and no payment is made to employees by way of salary by the PE. In the computation of profits all proper outgoings have to be allowed as deductions to the extent permitted under the Act.

Salaries paid to the employees and indeed all revenue expenses incurred for running the PE will have to be taken into account in determining its profits in India and in the scheme of Sections 44D and 115A would be deemed to have been treated as deductible.

9. Reference here may be made to the decision of CIT v. Sir S.M.Chitnavis (supra), wherein the Privy Council observed as under : "Although the Act nowhere in terms authorizes the deduction of bad debts of a business, such a deduction is necessarily allowable. What are chargeable to income-tax in respect of a business are the profits and gains of a year, and in assessing the amount of the profits and gains of a year, account must necessarily be taken of all losses incurred, otherwise you would not arrive at the true profits and gains." In view of the forgoing, it is clear that the salaries are paid by the applicant in Netherlands for the employment in India for the PE, to earn fees for technical services rendered in the source country. Cost incurred for rendering technical services is clearly deductible while determining the taxable profits of the applicant. We, therefore, concur with the conclusion of the Authority recorded in the case of Lloyds Helicopters

International (P) Ltd., In re (supra). However, in view of the decision of Hon'ble Supreme Court in Union of India and Anr. v.Azadi Bachao Aandolan and Anr. (2003) 263 ITR 706 (SC), we are unable to agree with the reasoning given in the Lloyds' case that the non-payment of tax by the applicant in India as well as in the other Contracting State can be a decisive factor.

10. Before parting it would be apposite to refer to the opinions of international commentators on the subject.

(i) "The phrase "borne by" must be interpreted in the light of the underlying purpose of sub-paragraph (c) of the article, which is to ensure that the exception provided for in para 2 does not apply to remuneration that could give rise to a deduction, having regard to the principles of Article 7 and the nature of the remuneration, in computing the profits of a PE situated in the State in which the employment is exercised. In this regard, it must be noted that the fact that the employer has, or has not, actually claimed a deduction for the remuneration in computing the profits attributable to the PE is not necessarily conclusive since the proper test is whether any deduction otherwise available for that remuneration would be allocated to the PE. That test would be met, for instance, even if no amount were actually deducted as a result of the PE being exempt from tax in the source country or of the employer simply deciding not to claim a deduction to which he was entitled." (ii) "It may be helpful in arriving at a suitable result in cases of uncertainty to consider the goal of the provision, which is to compensate for tax revenue lost through the deduction of operating expenses in the State of employment. It seems, therefore, that the remuneration is to be taxed in the State of employment even when the PE bears its costs but the employer is resident in a third State (also, van den hurk, H.T.P.M., 119 WFR 1229 (1990); differing, van Gennep, C.J.A.M., 118 WFR 1179 (1989). Conversely, the condition laid down in Article 15 (2)(c) can be taken to have been satisfied, i.e., the remuneration thus being taxable only in the State of residence, if the enterprise actually maintains in the State of employment a PE that bears the remuneration, but where, by virtue of Article 8 MC, the PE's profits are not taxed in the latter State.

The reason is that in such a case, the deduction of the remuneration as business expenses does not adversely affect the State of the PE." 11. For the aforementioned reasons, we rule on the question set forth above as follows : "The condition specified under Sub-clause (c) of Clause 2 of Article 15 of DTAA between India and Netherlands relates to the taxability of employees and not of the applicant and is, therefore, not relevant when Dutch BV is taxed in India, on presumptive basis under provisions of Section 44D and Section 115A of the Act."