"ALL CITIZENS ARE EQUAL BEFORE LAW AND ARE ENTITLED TO EQUAL PROTECTION OF LAW"–ARTICLE 27 OF THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH ● dslawdesk@yahoo.co.uk

LAW OPINION

Double taxation avoidance mechanism in Bangladesh

BARRISTER OMAR KHAN JOY

THE Double Taxation Avoidance Agreement (DTAA) is a tax agreement signed between two countries for resolving the issues regarding taxability of income and to help the taxpayers to avoid payment of income tax twice on the same income, asset and financial transaction in two separate jurisdictions. DTAA becomes applicable in cases where a taxpayer is a citizen/resident in one country but has a source of income situated in another country.

Generally, double taxation can arise when the same income is taxed at both the corporate level and personal level. Companies are separate legal entities from their shareholders, where companies pay taxes on their annual earnings, just like individuals. In case of international trade, such income may be taxed in the country where it is earned, and then taxed again when it is repatriated in the business' home country. As a result of such double taxation, international business becomes too luxurious to pursue. On the other hand, this may also be applicable for an individual. An individual who earns income has to pay tax in the country where the income is earned and also in the country where he/she is a citizen. Thus, the responsibility to pay income tax on the same income arises in the country of source of income and his/her home country as well.

> Double Taxation Avoidance Agreement(DTAA) encourages free flow of international trade and international investment and at the same time brings advantages for each contracting nation. It increases transparency as to the collection of income tax in both the countries and to allocate them rationally.

Thus, if an individual/entity needs to pay tax at both the places on the same income then they might even be left with almost a zero income. This surely affects the growth of economy as it has a negative economic impact, especially on the profit margin of an entity and salary of an individual.

Hence, this kind of double taxation on the same income causes grave consequences on the future of international trade and investment. Any foreign investor's trade and investment decision heavily depends on the taxation issues, including the tax brackets, tax holiday and the possibility to avoid double taxation. In this era of globalisation, such double taxation is not acceptable as it is considered to be one of the major impediments to the development of international economic relations.

Accordingly, in such circumstances DTAA comes to facilitate foreign investment and employment of expats. Such double taxation treaties are being treated as settlements between two countries which help to eliminate international double taxation.

Section 144. (1) of the Income Tax Ordinance, 1984 allows the government of Bangladesh to enter into an agreement with the Government of any other country for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income leviable under this Ordinance and under the corresponding law in force in that country. The Government may, by notification in the official Gazette, make such provisions as may be necessary for implementing the said agreement. By invoking such power, the Government of Bangladesh has signed DTAA with 36 countries including Bahrain, Belarus, Canada, China, Denmark, France, Germany, Indonesia, India, Italy, Japan, Republic of Korea, Kuwait, Malaysia, Myanmar, Nepal, The Netherlands, Norway, Oman, Pakistan, The Philippines, Poland, , Romania, Saudi Arabia, Singapore, Sri Lanka, Sweden, Switzerland, Thailand, Turkey, UAE, UK, USA, Vietnam, , etc.

While the terms and conditions of all the treaties are not fully identical, in general, they either state complete avoidance of double taxation or provide for application of reduced tax rates. Thus, it seems DTAA clearly encourages free flow of international trade and international investment and at the same time brings advantages for each contracting nation. It increases transparency as to the collection of income tax in both the countries and to allocate them rationally.

It is, however, important to note that if a person is making any payment to any non-resident and the non-resident is eligible to avail any tax benefit in Bangladesh under any DTAA whereby either no tax shall be deducted from the payment or tax shall be deducted at a reduced rate than prescribed in the Income Tax Ordinance 1984, then a certificate from National Board of Revenue (NBR) has to be obtained to that effect. NBR has the sole authority to provide such certificate after detailed scrutiny of the existing DTAAs and the payment in issue.

The said issue has been made clear by the Finance Act, 2018 by way of introduction of an amendment in the Section 56 of the Income Tax Ordinance, 1984. This states that where, in respect of any payment under this section, the Board, on an application made in this behalf, is satisfied that due to tax agreement or any other reason the non-resident is not be liable to pay any tax in Bangladesh, or is liable to pay tax at a reduced rate in Bangladesh, the Board may issue a certificate to the effect that the payment shall be made without any deduction or, in applicable cases, with a deduction at the reduced rate as mentioned in the certificate. It further states that, tax deducted under this section shall be deemed to be the minimum tax liability of the payee in respect of the income for which the deduction is made, and shall not be subject of refund or set off or an adjustment against a demand. Therefore, banks should receive the certificate from the payee before allowing any tax benefit under the DTAA while remitting the money abroad.

Therefore, such DTAAs are evidently an interaction of two different tax systems each belonging to different country, which aim to diminish the effect of double taxation. Bangladesh should take initiative to enter into more and more such agreements with other countries to further promote Foreign Direct Investments and engagement of individuals.

THE WRITER IS AN ADVOCATE, SUPREME COURT OF BANGLADESH. HE IS THE HEAD OF THE CHAMBER OF A LAW FIRM CALLED 'LEGAL COUNSEL'.

LAW NEWS

Celebrating the bi-lingual translation of the HCD verdict on rivers

LAW DESK

ON Wednesday, 11 November 2020, the bi-lingual English-Bangla translation of the 2019 landmark HCD judgment recognising rivers as legal personalities was launched. The HCD judgment of a public interest litigation regarding illegal encroachment and pollution of rivers across the country established that rivers have a legal personality. The judgment relied on the Public Trust doctrine to uphold the public's right to environment.

The translation project was funded by UK Research and Innovation and approved by Justice Ashraful Kamal of the High Court Division of the Supreme Court of Bangladesh last month. The launching event was graced by the presence of Her Excellency Saida Muna Tasneem, High Commissioner of the People's Republic of Bangladesh to the United Kingdom; Honourable Justice Ashraful Kamal of the High Court Division of Supreme Court of Bangladesh; and Professor Robert Hope from the REACH Water programme at the University of Oxford. Ms. Rebecca Hope from the School of Geography and Environment, University of Oxford and Mr. Mohammad Golam Sarwar, Lecturer, Department of Law, University of Dhaka and also the Consultant of this project represented the translation team.

The panelists included Mahfuz Anam, Editor and Publisher, The Daily Star; Advocate Manzill Murshid, President, Human Rights and Peace for Bangladesh and lawyer for the case; Mr. Sharif Jamil, Secretary, BAPA and Dr. Erin O'Donnell, University of Melbourne and water law specialist. The panel was chaired by Ms. Sharmeen Murshid, Member, National River Conservation Commission.

In her welcome remarks Ms. Peters stated that a widespread commitment to enact law and practice rule of law is essential to effectively implement the judgment. Mr. Golam Sarwar shed light on the significant aspects of the judgment which included the historical, economic literary and cultural aspects of rivers and the need for effective participation of implementing stakeholders such as the NRCC. Professor Hope opined that it is important to understand who is interacting with the rivers and who is at most risks so that early and preventative action may be undertaken.

Her Excellency Saida Muna Tasneem stated that the historic verdict coming coincides with the great political commitment of saving the rivers and the advocacy by the Honorable Prime Minister of Bangladesh. Honorable Justice Ashraful Kamal shed light on the impact of climate change on future generations and urged for law and policymakers to play an active role for the preservation of nature.

Mahfuz Anam stressed on the importance of proper implementation of existing laws and opined that destroying the rivers is basically destroying our future. Mr. Sharif Jamil and Advocate Manzill Murshid discussed the need for coordinated effort and the role of public interest litigation respectively. Professor O'Donnell shed light on the importance of community engagement.

The remarks by the speakers and panelists were followed by a lively and interactive Q&A session.

RIGHTS WATCH

ONE MOTI MATBOR AND THE PROBATION ORDINANCE

LAW DESK

ON November 8, 2020, in a landmark verdict, the High Court Division upheld five years' imprisonment of a convict, Moti Matbor, in a narcotics-related case, but allowed him to stay with his family on three conditions: ensuring continuation of studies of his 10th-grader daughter and second-grader son, taking care of his 75-year-old mother and not marrying off his daughter, now 15, until she turns 18 as per the relevant law. This historic verdict has brought to the forefront quite an old law: The Probation of Offenders Ordinance, 1960. This law, despite being in place for long, is rarely invoked.

The said Ordinance allows courts to sentence someone to something other than a fine or imprisonment. It also makes room for conditional discharge or release on probation- as an alternative to incarceration. According to section 4 of the Ordinance, if first time offenders are convicted of an offence punishable with imprisonment for not more than two years, the court may make an order discharging them after an admonition; make an order discharging them subject to the condition that they enter into a bond (with or without sureties) for committing no offence and being of good behaviour during such period not exceeding one year from the date of the order as may be specified therein.

The conditional discharge will be decided having regard to "the age, character, antecedents or physical or mental condition of the offender, and the nature of the offence or any extenuating circumstances attending the commission of the offence".

In any case, Section 5 establishes that where a court is of the opinion that the offender – "having regard to the circumstances including the nature of the offence and the character of the offender" – should not be sentenced to imprisonment they can order their release on probation. The use of probation has a strong gender dimension, as it has been extended for women convicted of any offence not punishable with death, whereas a man convicted of an offence punishable by death, life imprisonment, or certain other offences in Chapter VI or VII of the Penal Code 1860 (e.g. offences against the State, extortion by putting a person in fear of death or grievous hurt, offence of harbouring robbers or dacoits etc.) is not entitled to be released on probation.

According to Section 3 of the Ordinance, the High Court Division, a Court of Sessions, a District Magistrate, a Magistrate of the 1st Class, and any other magistrate especially empowered in this behalf shall be empowered to exercise powers under the Ordinance.

With the Probation of Offenders Ordinance 1960, among others, the penal system in Bangladesh does have the essence of reformative form of justice as opposed to a retributive one. However, the use of probation by the courts in Bangladesh is rare, owing largely to certain widespread misconceptions, (such as that probation is available only for first time offenders), absence of comprehensive policies, overarching monitoring or supervision, lack of awareness and capacity-building among the concerned officials, and the lack of clarity in the laws themselves on the administrative accountability with regard to the granting of probation, according to BLAST, a human rights organisation.

LAW VISION

Global Innovation Index 2020 and Bangladesh

MOHAMMAD ATAUL KARIM

WORLD Intellectual Property Organisation (WIPO) has released Global Innovation Index (GII) on September 2, 2020 in which Bangladesh ranks 116th on overall innovation indicators among 131 economies. The GII assesses world economies based on 80 innovation indicators. As per the GII, performance of Bangladesh has been better in this year on innovation outputs than innovation inputs. It ranks119th in innovation inputs while ranks 114th in innovation outputs. Regrettably, the position of Bangladesh in aforesaid fields have been lower in compared to the last two years. Moreover, Bangladesh ranks 24th and 10th respectively among the 29 lower middle-income group economies and 10 economies in central and southern Asian countries. The GII, 2020 demonstrates that Bangladesh has performed below expectation on relationship between innovation and development. There are seven GII pillars of assessment, namely, institution, human capital and research, infrastructure, market sophistication, business sophistication, knowledge and technology outputs, and creative outputs. As far as GII pillars are concerned, Bangladesh performed below average in all areas compared to other economies of central and southern Asian countries, and only performed above average on infrastructure and rest of the sectors remain in below average as compared to other lower middle-income group economies.

Some notable sub-areas among the seven pillars of GII may be relevant to depict the scenario of Bangladesh. In expenditure of education as per GDP our rank is 115th while in university and industry collaboration our position is 121th. In terms of intellectual property issues such as in knowledge absorption category- IP payment as per % of total trade is 106, in knowledge creation-patent by origin is 114 and knowledge diffusion-IP receipts as per % of total trade is 103. In the fields of human capital and research, such as researchers' contribution and QS University ranking, position of Bangladesh is very deplorable. The performance of Bangladesh on the various areas of creative outputs, namely in intangible assets- trademarks, industrial designs, global branding value, etc. is overall satisfactory. As Bangladesh has not joined in the PCT system, thus, we do not have any score thereof.

It is observed that despite the noticeable progress in many areas of Bangladesh, particularly in ICT sectors, economic indicators and GDP, the

overall condition of innovations and creativity has not been up to the mark. Bangladesh needs to revisit and assess why its position remains constantly poor in GII during last three years. In general, our university education is not practical goals oriented, it lacks laboratories, infrastructures, funds and other academic amenities which in turn do not encourage creativity and innovations. Further, we have almost non-existent collaborations between the industries and universities. There should be central or individual and/or both IP policies for universities of Bangladesh which would clearly design and aim at encouraging creativity and innovation. Moreover, national IP academy should be established for disseminating IP education and training. It will transform the human capital, knowledge generation and at the end generate creativity and innovation. Stable governance, policy stability, coherent IP policies are also needed to improve the overall innovation indicators. Intellectual property office of Bangladesh (DPDT) should adopt the initiatives to increase awareness on various issues of IP in Bangladesh and increase filing and registration of industrial property rights in Bangladesh. Bangladesh should also join to the PCT system for registration of patents and Madrid system for registration of trademarks. This will, overall, help to increase the filing and registration of patents and trademarks from domestic and foreign origins. The Global Innovation Index does not itself generate any new data set for the assessment rather relies on the available data in the relevant fields. Thus, the concerned government institutions of Bangladesh need to take special consideration to make relevant data available. The analysis of Bangladeshi data of last three years and rank thereof in GII, indicate the re-use of similar data set. Perhaps, this is one of the reasons why position of Bangladesh continues to remain poor. There should be coordination and collaboration among the relevant government agencies of Bangladesh, such as prime ministers' office, ICT division, ministry of industries, other relevant ministries and IP office of Bangladesh (DPDT). Intellectual property office of Bangladesh (DPDT) may take lead in coordinating among the relevant institutions to prepare Bangladesh for the next GII assessment. Overall, Bangladesh should particularly pay attention to improve its position in the GII because it may demonstrate, inter alia, image of the country in relation to innovation and may provide a signal to foreign investors.

THE WRITER IS ADVOCATE, SUPREME COURT OF BANGLADESH, CURRENTLY PURSUING LL.M. IN IP AND COMPETITION LAW AT MIPLC, GERMANY.