INTERNATIONAL TAXATION

CA. Hinesh Doshi, CA. Pramita Rathi

Amarchand & Mangaldas & Suresh A Shroff & Co., vs. Assistant Commissioner of Income Tax Circle 16(2), Mumbai [TS-666-ITAT-2020(Mum)] dated 18th December, 2020

Facts:

- The assessee, a well-known law firm, was assessed to tax as a partnership firm.
- The assessee earned professional fees in Japan and tax on the same was withheld at 10% of gross billing in Japan as per article 12 – FTS of Indo-Japanese tax treaty.
- During the assessment proceedings, AO observed that the assessee had claimed foreign tax credit in respect of taxes withheld by its clients in Japan.
- AO, on basis of article 14, viewed that the taxes were wrongly withheld in Japan, and the assessee was not entitled to a foreign tax credit in respect of the same.
- Aggrieved, the assessee filed an appeal before ITAT.

Issue:

- Whether the taxes withheld by Japanese clients would be allowed as foreign tax credit to the assessee?

Held:

- ITAT noted that there were overlapping areas in the definition of FTS under Article 12(4), which covers technical, management and consultancy services vis-à-vis the definition of professional services income under Article 14 as 'income from independent personnel services'.
- ITAT stated that a tax treaty was required to be interpreted as a whole, which essentially implied that the provisions of the treaty were required to be construed in harmony with each other.
- ITAT observed that the exclusion clause under Article 12(4) covered only payments "to any individual for independent personal services referred to in article 14", and therefore as the assessee was a partnership firm, Article 12(4) was not triggered.
- ITAT stated that thus the payments in question were rightly subjected to tax withholding as under Article 12 in Japan.
- Referring to the Canadian Federal Court ruling and OECD commentary, ITAT observed that "when the interpretation of the residence country about the applicability of a treaty provision is not the same as that of the source jurisdiction about that provision, and yet the source country has levied taxes whether directly or by way of tax withholding, the tax credit cannot be declined".
- Accordingly, ITAT ruled in favour of assessee.

Expeditors International of Washington Inc. vs. Deputy Commissioner of Income Tax Circle 1(2)(2), New Delhi [TS-61-ITAT-2021(DEL)] dated 11th February, 2021

Facts:

- The assessee, incorporated in USA, operated in three primary segments: airfreight, ocean freight & ocean services and customs brokerage and other services, domestically and globally through its wholly owned and majority owned subsidiaries.
- During the assessment proceedings, AO was not satisfied with the contention of assessee of not constituting international freight logistic services and reimbursement of global account management (GAM) expenses as FTS as per section 9(1)(vii) of the Income-tax Act, 1961 and India-USA tax treaty.
- Aggrieved that assessee filed an appeal before ITAT.

Issue:

- Whether international freight logistic services and reimbursement of global account management expenses would be taxable as FTS?

Held:

- ITAT noted that the support services were general services in nature and did not require any managerial/technical or consultancy expertise and does not fall within the purview of managerial/technical or consultancy expertise.
- ITAT observed that the assessee provided services in the nature of pure logistic support for shipment of transport of goods perform outside in India and the contract was entered between an Indian Co. and the customers.
- ITAT observed that as regards to GAM expenses, the cost of group entities was allocated to respective countries and were incurred outside India.
- ITAT further stated that the actual expenses incurred by the assessee were allocated in proportion to the revenue by the relevant group entity in that country from that particular customer which was managed by the GAM team.
- ITAT noted that these expenses, had no income element embedded in them, and were then reimbursed on actual basis.
- Accordingly, ITAT ruled in favour of assessee.

M/s. Ricardo UK Limited vs. DCIT (International Taxation) Circle 3(1) (1), New Delhi [TS-103-ITAT-2021(DEL)] dated 17th February, 2021

Facts:

- The assessee incorporated under United Kingdom's law, provided testing services and conducting feasibility analysis of transmission system designed for automobiles.
- The assessee filed return of income declaring "Nil" income claiming that the income earned by the assessee was not taxable in India.
- AO held that the taxpayer had PE in India in form of domestic subsidiary company, and therefore AO held that the 50% proceeds from business profits attributed to Indian PE are taxable at 40% plus surcharge & education cess.
- Being aggrieved by the AO's contention, the assessee appealed before ITAT.

Issue:

- Whether the assessee is liable to pay tax on the 50% proceeds of business profits attributable to Indian PE?

Held:

- Referring to article 7 of the U.N. Model Convention, ITAT held that only that portion of business profit is taxable in the source country which is attributable to PE.
- Under Article 7 (2) not all profits would be taxable in India but only those which have economic nexus with the PE in India, a foreign enterprise is liable to be taxed in India on so much of its business profit as is attributable to the PE in India.
- ITAT further relied on coordinate bench ruling in case of Amadeus Global Travel Distribution S.A and HC ruling in case of Galileo International Inc. wherein it held that 'If the remuneration is paid to the dependent agent which is less than the income attributable to its PE, then no further income is chargeable to tax.'
- ITAT held that after deduction of commission/remuneration from the assessee from the profits attributed to the PE, no such Income is taxable in the hands of PE.
- Accordingly, ITAT ruled in favour of assessee.