

INTERNATIONAL TAXATION

CA. Hinesh Doshi, CA. Ronak Soni

J.Korin Spinning Pvt. Ltd. vs. The Income Tax Officer, (International taxation), Surat [TS-803-ITAT-2019(Ahd)] dated 13th December, 2019

Facts:

The assessee, an Indian company, engaged in textile business, had made remittance in the nature of fees to Mr. Lee Kyo Kee, a non-resident individual.

The assessee did not deduct TDS on these payments as the same was covered under Article 15 of India-Korea DTAA.

AO held that these payments fell under FTS and were liable to tax under Article 13 of India-Korea DTAA.

Aggrieved, the assessee filed an appeal before the learned CIT (A), wherein CIT(A) dismissed the appeal filed by the assessee.

Aggrieved, the assessee filed an appeal before ITAT.

Issue:

Whether the Indian company was liable to withhold tax on the payments made overseas?

Held:

ITAT observed that Mr. Lee Kyo Kee is an individual of Korean nationality having no fixed base in India.

ITAT stated that the agreement has been entered into with Mr. Lee Kyo Kee, an individual, and not with any 'firm' or 'company'.

Further, he has been referred to as 'Technical Advisor' as per the agreement.

ITAT also observed that the clauses of the agreement clearly indicate that the services which were intended to be received by the assessee were purely independent services in terms of Article 15 of DTAA and also as noted in Form 15CA filed by the assessee, relief, if any, would be claimed in terms of Article 15.

ITAT ruled that the income received by Mr. Lee Kyo Kee becomes taxable only in Korea with the Indian Party having no obligation to withhold tax.

Thus, ITAT ruled in favour of the assessee

Trimble Solutions Corporation vs Deputy Commissioner of Income Tax [TS-810-ITAT-2019(MUM)] dated 19th September, 2019

Facts:

The assessee, incorporated in Finland was engaged in the business of developing and marketing specialized off-the-shelf software products

The assessee has received payments for distribution of its off-the-shelf software and also for maintenance and support services (including upgrades) from its distributor (It's WOS) based in India

The AO held that the payments so received were in the nature of 'Royalty' as taxable in India under section 9(1)(vi) of the Income Tax Act, 1961 while the assessee had shown the same in the nature of sales revenue. For the same, the assessee had filed an appeal with ITAT

Issue:

Whether revenue received from distribution of off-the-shelf software and providing maintenance and support services would be treated as Royalty under the Section 9(1)(vi) of the Income Tax Act, 1961?

Held:

ITAT held that payment received by assessee from its distributors for sale of 'off-the-shelf' software and provision of maintenance and support services was not royalty under the India-Finland DTAA.

Further, the payment received by the assessee towards distribution of sub-releases and main releases were also a right to provide a copyrighted article and not for any copyright embedded in the said copyrighted article.

Also, as per the agreement between the assessee and the distributor, the responsibility to resolve queries of end users was that of the distributors and hence payments received by the assessee from rendering of maintenance and support services did not fall within the scope of the definition of royalty in Article 12 of the India-Finland DTAA

To conclude, in absence of vesting of any right of commercial exploitation of the Intellectual property contained in the copyrighted article with the distributor, the amount received by the assessee from its distributor was in nature of sales revenue and not in the nature of royalty.

Kelly Services Inc, vs Deputy Commissioner of International Tax [TS-832-ITAT-2019(Mum)] dated 17th September, 2019

Facts:

The assessee, based in the United States of America, received management fees from its India counterpart for rendering support services along with advising the entities globally on best practises relating to IT, financial functions, and other business support services

The AO held that the above services would fall under the ambit of 'Included Services' as per Article 14 of DTAA between USA and India

The AO also had charged a higher rate of 15% as per DTAA as against 10.3% as per regular provisions of the Income Tax Act, 1961

Issue:

Whether the services as listed above by the assessee falls under the ambit of included services of Article 14 of DTAA between USA and India or the same was to be treated as independent services?

Whether the assessee should be charged a higher rate as per DTAA or a lower rate as defined in the act?

Held:

The case was referred to ITAT, where the ITAT observed that Article 14(a) deals with the payments for rendition of technical or consultancy services which are ancillary and subsidiary to the application of enjoyment of a right, property or information for which a payment was received. ITAT observed, that the services in question were independent services on standalone basis and hence, article 12(4)(a) didn't come into play

ITAT also observed that there was nothing in substance to show that there was transfer of technology so as to satisfy the 'make available' clause of Article 12(4)(b)

ITAT observed that payment of consideration would be regarded as "fees for technical/included services" only if the twin test of rendering services and making technical know-how available at the same is satisfied which was not so in this case

Relying on the ruling of Delhi High Court in case of Guy Carpenter and Co Ltd. and Karnataka High Court ruling in case of De Beers India, the ITAT rejected the invocation of Article 12(4)(b) due to an absence of 'make available' condition in this case

The ITAT also observed, that the tax rate which was more beneficial to the assessee would be the tax rate on which the income under consideration would be taxed at. As the tax rate as per regular provisions were more beneficial to the assessee as compared to the rate as per DTAA, the assessee would be charged at the rate of 10.3%.

CMA CGM Agencies India Private limited [TS-2-ITAT-2020(PUN)] dated 02.01.2020

Facts:

The assessee, an Indian Company, was engaged in the business as shipping agent.

The assessee claimed in its return of income, deduction for payment of software maintenance charges to CMA CGM, France (Parent Company) which was disallowed u/s .40(a)(i).

Revenue contended that the payment was towards carrying out other business operations, as Royalty and for maintenance of software as Fees for technical services liable for deduction of tax at source u/s. 195.

Aggrieved, the assessee filed an appeal before ITAT.

Issue:

Whether payment of software maintenance charges was liable for deduction of tax at source u/s. 195?

Held:

ITAT observed that it did not constitute Royalty under the DTAA as the amount paid were only for the use of the software for assessee's own business purpose and not having any rights to copyright the same.

ITAT considered the Most Favoured Nation (MFN) clause and examined the limited scope of definition of FTS under Article 12 of the DTAA between India and Portuguese and contends that the payment in the present case does not satisfy the requirement of 'use of, or the right to use, any copyright of software', and further, that the parent company did not 'make available' any technical knowledge, experience or skill etc. to the assessee hence not liable for deduction of tax at source.

Thus, the appeal was allowed in favour of the assessee.