SCA Hygiene Products AB vs. Deputy Commissioner of Income Tax (International Taxation)-4(2)(1) [TS-4-ITAT-2021(Mum)] dated 8th January, 2021

Facts:

- The assessee, a company incorporated in Sweden, entered into a service agreement with its subsidiary company in India, to render services in relation to hardware and software for business systems such as SAP on cost-to-cost basis without any markup, and for leading the work of building up a new factory site.
- The work for new factory site was done for consideration of approximate actual cost and expenses.
- The assessee also received consideration for services related to Information Technology in connection to providing the SAP system.
- AO opined that the said receipt must be brought to tax under Article 12 of India Sweden DTAA as also under the Income Tax Act.
- Aggrieved, the assessee filed an appeal before Mumbai ITAT.

Issue:

Whether the receipt for providing IT services and for assistance in building up the new factory site is taxable as fees for technical services (FTS)?

Held:

- ITAT invoked the MFN clause and applied the restrictive provision of FTS in Indo-Portugal treaty.
- ITAT stated that the "make available" clause was not satisfied, in the course of rendition of services by the assessee, and, as such, the consultancy fees cannot be brought to tax, in the hands of the assessee, under Article 12 of Indo Swedish tax treaty.
- In connection to IT Services, ITAT held that the receipt was purely in the nature of reimbursement which was paid by assessee to a third party and further, the "make available" clause was not satisfied.
- Hence, ITAT ruled in favour of the assessee.

M/s. NGC Network Asia LLC vs. The Income Tax Officer (International Tax) - 3(2) [TS-705-ITAT-2020(Mum)] dated 30th December, 2020

- The assessee, a US based company, primarily engaged in the media industry, executed an advertisement sales representation agreement with a representative Indian company for marketing and collection of advertisement revenue for which it was remunerated commission.
- The assessee claimed that the income from advertisement air time was business income and in the absence of a Permanent Establishment (PE) in India, the same was not taxable.
- AO held that the Indian company constituted PE as a dependant agent as per Article 5 of India-USA DTAA and brought the said income to tax.
- AO further stated that the distribution revenues earned by the assessee was within the meaning of "Royalty" under Article 12 of India USA DTAA and accordingly, such distribution revenues was taxable in India.
- Aggrieved, the assessee filed an appeal before ITAT.

Issue:

- Whether the commission paid to the Indian company was liable to be taxed in India and whether the said Indian company was a PE of the assessee?
- Whether the rights granted by the assessee and the related distribution revenue was to be taxed as "Royalty" in India?

Held:

- ITAT observed that the commission retained by Indian company was on arm's length basis, which was evident through transfer pricing assessments.
- ITAT noted that even assuming the Indian company constituted a PE, considering the fact that it had been remunerated at arm's length price, no further profit could be attributed in the hands of the assessee.
- ITAT also observed that Indian advertising agent's commission income from assessee was less than 1% of its total commission income, and therefore the Indian advertising agent was not to be treated as dependent agent.
- Further, ITAT noted that the assessee had no control over the activities undertaken by the Indian company upon grant of distribution rights, nor did it undertake any activity in India as regards the distribution rights granted.
- ITAT held that that the distribution rights granted was only a commercial right / Broadcast reproduction right and not copyright and consequently consideration received by the assessee for the same cannot be treated as royalty or fees for included services under Article 12 of India-USA DTAA.
- Accordingly, ITAT ruled in favour of the assessee.

Director of Income Tax (International Taxation) vs. M/s. Abbey Business Services India Pvt Ltd [TS-655-HC-2020(KAR)] dated 1st December, 2020

Facts:

- Abbey National PLC, UK (ANP) entered into secondment agreement with the assessee company to facilitate the outsourcing agreement between ANP and a third service provider in India. The assessee company is a subsidiary of ANITCO Ltd, a group company of ANP.
- The assessee made certain payments in the nature of was salary reimbursement on which TDS was deducted and reimbursement of hotel & travelling expenses on which TDS was not deducted.
- Revenue held that the payment so made was in the nature of fees for technical services (FTS) as per Sec. 9(1)(vii) and also as per Article 13 of India-UK DTAA.
- Bangalore ITAT held that there was no obligation on the part of the assessee to deduct TDS on payments made to ANP.
- Aggrieved, the Revenue filed an appeal before Karnataka High Court.

Issue:

- Whether expense reimbursement on seconded employees is liable for TDS?

Held:

- High Court observed that the seconded employees had to work at such places as per the instruction of the assessee and the employees had to function under the control, direction and supervision of the assessee and in accordance with the policies, rules and guidelines applicable to the employees of the assessee.
- Further, the High Court also observed that the employees in their capacity as employees of the assessee had to control, and supervise the activities of the third party service provider.
- High Court opined that the assessee for all practical purposes had to be treated as employer of the seconded employees and that there was no obligation in law for deduction of TDS on payments made for reimbursement of costs incurred by a NR enterprise.
- Therefore, the amount paid by the assessee was not amenable to TDS u/s 195, as also not taxable as FTS.
- Accordingly, High Court dismissed the appeal of the Revenue.

DCIT – International Tax (Bengaluru) vs. M/s. Coffeeday Enterprises Ltd [TS-671-ITAT-2020(Bang)] dated16th December, 2020

Facts:

- The assessee, issued Compulsorily Convertible Debentures (CCD) to a Cypriot Investor and later the interest on the said CCD's were waived off.
- Revenue held that TDS should be deducted on such Interest u/s 195 and accordingly, it passed an order u/s 201 against the assessee for failure to deduct TDS.

- Aggrieved, the assessee appealed to ITAT.

Issue:

- Whether TDS was required to be deducted on interest which was not actually paid and also which was not claimed as expenditure by the assessee?

Held:

- ITAT held that the interest on CCD was neither actually paid to the Cypriot investor nor was it claimed as expenditure by the assessee.
- ITAT also held that the term 'paid' in the India-Cyprus DTAA was to be interpreted as intended to be taxed on paid basis and not on accrual basis.
- It also held that the purpose of deduction of TDS was not to collect a sum which was not a tax levied under the Act, but was to facilitate the collection of tax lawfully leviable under the Act.
- Further, it also held that the TDS liability would not arise as interest was not actually paid, but merely deferred and eventually waived off by the investor under an agreement.
- It also held order u/s 201 was made after expiry of seven years from end of relevant F.Y. and accordingly was not made within a reasonable time
- Accordingly, the ITAT ruled in assessee's favour.