INTERNATIONAL TAXATION

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M/s MTR Corporation Ltd vs Deputy Commissioner of Income Tax, International Taxation Circle 2(2)(1), New Delhi [TS-261-ITAT-2023(DEL)]dated 16th May, 2023.

Facts:

- The Assessee is a Hong Kong based company.
- Assessee received an amount of Rs.28.51 Cr from DAMEPL for AY 2011-12 pursuant to a global tender (contract) for providing engineering and project management consultancy services for airport line of Delhi Metro and offered the same to tax as FTS under Section 115A read with Section 9(1)(vii) at 10%.
- Revenue held that perusal to nature of work ,DAMEPL provided space and other facilities for execution of project which establishes a business connection in India.
- Revenue rejected assessee's contention and assessed the receipts of Rs.28.51 Cr. from DAMEPL as income from business or profession under Section 44DA and taxed it at 40% after allowing deduction of employee's salary of Rs.7.09 Cr.
- Aggrieved, the assessee filed an appeal with the ITAT.

Issue:

Whether the receipts will be treated as Business/Profession income or FTS?

Held:

- Section 44DA gets attracted and receipts in the nature of royalty or FTS can only be computed under the head 'business or profession' upon the fulfilment of the conditions namely (i) the income must be in nature of royalty or FTS, (ii) royalty or FTS must be received by an non-resident or a foreign company from an Indian entity in pursuance to an agreement executed after Mar 31, 2003, (iii) Non-resident entity or foreign company carries on business through a PE and (iv) right, property or contract is respect of which royalty or FTS paid is effectively connected with such PE.
- ITAT held that Revenue failed to provide any corroborative evidence to demonstrate that the assesse carried out business/profession in India wholly or partly through a fixed place of business.
- Relying on SC ruling in E-Funds wherein it was held that merely giving access of a place to the enterprise for the purpose of project will not amount to putting the premise at the disposal of the enterprise for determination of fixed place of business, and accordingly it was held that the assesee was not having PE in India.
- Thus, ITAT ruled in the favour of the assessee.

M/s. Charles River Laboratories Inc. vs Assistant Commissioner of Income Tax, International Taxation, Circle – 2(1),Bengaluru. [TS-296-ITAT-2023(Bang)]dated 1st June, 2023.

Facts:

- The assesse is a USA based entity engaged in in rendering pre-clinical laboratory services to enable the determination of a safe dose and assess the potential toxicity of new drugs prior to human clinical trials by way of conducting in vitro and in vivo tests and trials which are largely catered towards Indian customers in the pharmaceutical, medical device and biotechnology industries.
- For AY 2013-14 (lead case), assesse received Rs.9.77 Cr from its various Indian customers for services rendered, which was not offered to tax in India nor tax was deducted at source by the customer.
- Revenue initiated reassessment proceedings and held that the income from pre-clinical lab services were taxable as FTS/FIS both under the Act as well as India-US DTAA, which was confirmed by DRP.
- Aggrieved, the assessee filed an appeal with the ITAT.

Issue:

- Whether the pre-clinical lab services will be taxable as FTS/FIS ?

Held:

- ITAT refers to clause of the Master Service Agreement defining ownership, points out that all inventions or techniques for rendering of necessary services by assessee to its client remain the exclusive property of the assesse alone.
- ITAT opined that the assessee has complete knowledge and know-how and expertise to carry out the research and to issue reports based on the study conducted as per the agreement, remarks that "The reason for such agreements between the assessee and its Indian clients for carrying out research and to issue reports is merely providing information for enabling the Indian client to use such data to perform its business."
- Relying on decision of Hyderabad ITAT, in which assesse had entered agreement with Dr Dr. Reddy's Laboratories where they had considered payments made by Dr. Reddy's Laboratories to a similar contract research organization and held that the payments were not taxable as FTS in India.
- ITAT stated that elements necessary for satisfying the 'make available clause' were absent in the services rendered by the assessee to its Indian customers/clients.
- Thus, ITAT ruled in the favour of the assessee.

Qualcomm Incorporated USA vs Deputy Commissioner of Income Tax, International Taxation, Circle 3(1)(1), New Delhi [TS-316-ITAT-2023(DEL)] dated 13th June, 2023

Facts:

- Assessee, a US-tax resident and is a world leader in 3G/4G and next generation wireless technologies, holding a number of patents in the field of manufacture of subscriber units and network equipment capable of operating on Code Division Multiple Access (CDMA)technology.
- For AY 2014-15, assessee offered royalty income from Original Equipment Manufacturers (OEMs)carrying on business in India through their PE's to tax whereas the royalty on mobile handsets from OEMs outside India and royalty on infrastructure equipment received outside India were not offered to tax.
- Revenue held that OEMs have PE in India and the intellectual property is being used through PEs to earn revenue from India and although the patented technology is not used by the OEMs, but the same is used by the end user in India, thus royalty paid by the OEMs to the assessee is sourced in India and liable to tax under Section 9(1)(vi)(c) as well as Article 12(7) of India-US DTAA.
- Aggrieved, the assessee filed an appeal with the ITAT.

Issue:

- Whether royalty earned from manufacture of mobile handsets from OEMs outside India will be taxable in India?

Held:

- ITAT noted assessee's own case from AY 2005-06 to 2008-09 in which coordinate bench agreed with the observations made in earlier order to the effect that as long as patents are used in the manufacturing process, which has taken place outside India, such royalty income cannot have tax implications in India.
- ITAT observed that coordinate bench categorically held that foreign OEMs, since, have not carried on any business in India, it cannot be said that such OEMs have used assessee's patents for the purpose of any business by them in India and thus royalty income cannot be taxed under first limb of Section 9(1)(vi)(c).
- ITAT held that while deciding appeals for AY 2009-10 to 2012-13, coordinate bench held that the royalty income received from OEMs located outside India is not taxable in India and stated that since the factual position in the subject AYs is not different and when the entire edifice of the present additions is based on assessment order passed for AY 2012-13, which now stands reversed, the addition made cannot be sustained.
- Thus, ITAT ruled in the favour of the assessee.