INTERNATIONAL TAXATION

CA. Hinesh Doshi, CA. Ronak Soni

JCDecaux S.A. vs. ACIT, International Taxation [TS-183-ITAT-2020(DEL)] dtd. 20th March, 2020

Facts:

- The assessee, a company incorporated in France, is engaged in the field of outdoor advertising.
- The assessee is owner of all intellectual property rights including copyrights in 'drawings and models', 'trademarks', 'patents', 'domain names' and 'know-how' developed and used by the JCDecaux group across the globe.
- AO treated the corporate guarantee fee received by the assessee from its Indian AE as Fees for Technical Services which was held as actually received in lieu of services rendered in the guise of corporate guarantee fee.
- Aggrieved, the assessee filed an appeal before Delhi ITAT

Issue:

- Whether the corporate guarantee fee can be taxed as FTS either under Sec. 9(1)(vii) or under India-France DTAA?

Held:

- ITAT noted that the assessee charged a corporate guarantee fee for provision of corporate guarantee to foreign banks for money borrowed by its Indian AE.
- ITAT rejected AO's stand on account of lack of evidence.
- ITAT opined that services provided for corporate guarantee were not in the nature of managerial, technical or consultancy services.
- ITAT held that corporate guarantee fees received cannot be termed as Fee for Technical Service either under Sec. 9(1)(vii) or under India-France DTAA.
- Accordingly, ITAT ruled in favour of the assessee.

Triton Communications Pvt Ltd vs. ACIT [TS-122-ITAT-2020(Mum)] dated 28th February, 2020.

Facts:

- The assessee made payments in the nature of subscription fees to a US based entity the services of integrated communication resources received by it.
- AO observed that the assessee had not withheld tax while making payment for the services rendered.
- AO held that the services availed by the assessee are technical in nature and accordingly stated that these payments were liable to be taxed in India as per section 9(1)(vii) of the Income Tax Act.
- Aggrieved, the assessee filed an appeal before ITAT.

Issue:

- Whether the subscription fees paid to US entity for services availed were FTS as per Sec. 9 (1) (vii) of the Income Tax Act?

Held:

- ITAT stated that the overseas entity offered services only to its members and these services were subject to only those members.
- ITAT held that the availing of net based services was outside the ambit of FTS provisions.
- ITAT further stated that the assessee had utilized these information outside India.
- Relying on Bombay HC ruling of Indusind Bank, ITAT concluded that the subscription payments will not fall under FTS provisions and will not attract TDS.
- Accordingly, ITAT ruled in favour of the assessee.

Sofina S.A. vs. Asst. CIT (International Taxation) [TS-129-ITAT 2020(Mum)] dtd. 5th March, 2020

Facts:

- The assessee, resident of Belgium, undertook transfer of shares to a Singapore company which in turn held 99.99% stake in an Indian company.
- AO and DRP invoked the Article 13(5) of Ind0-Belgium DTAA and explanation to Sec. 9 (1)(i) of the Income Tax Act and brought to tax the short-term capital gains on account of such indirect transfer.
- Aggrieved with the order, the assessee appealed to Mumbai ITAT.

Issue:

- Whether the assessee would be liable for capital gains as per Explanation 5 to Section 9(1)(i) of the Income Tax Act, 1961?
- Whether a unilateral amendment in the domestic law can be allowed to override the provisions of a tax treaty?

Held:

- ITAT held that Article 13(5) of India-Belgium Tax treaty is applicable only if assessee is resident in either of the contracting states and as "resident" and "contracting state" have been defined in the treaty, reference to domestic law under Article 3(1) of tax treaty did not arise.
- The term "Participation" is in context of participation in profits and not in context of participation of shareholding of a company as interpreted by the A.O and DRP.
- ITAT relied on the HC ruling in the case of Sanofi and concluded that the transfer of shares was eligible to tax in Belgium under Article 13(6) of Indo-Belgium DTAA.
- ITAT also held that a unilateral amendment in the domestic law cannot be allowed to override the provisions of a tax treaty.
- ITAT thus ruled to tax the capital gains in Belgium and ruled in favour of the assessee.

D&H Secheron Electrodes Pvt Ltd vs. ITO (IT & TP) [TS-141-ITAT-2020(Ind)]dtd. 6th March, 2020

Facts:

- The assessee company, engaged in the business of welding electrodes, made payments to a South Korean company for providing engineers as per requisite description.
- AO treated these payments as fee for technical services and considered these payments liable for TDS u/s. 195 of the Income Tax Act.

- Aggrieved by the order of AO and CIT(A), the assessee preferred an appeal before Indore ITAT.

Issue:

- Whether payment made by the assessee to non-resident for placement services are Fee for Technical services?
- Whether these payments are liable for TDS u/s. 195 of the Income Tax Act?

Held:

- ITAT ruled that the payments made by the assessee was merely paid for placement services which did not require any technical expertise.
- ITAT perused the terms of the agreement such as client's responsibility, guarantee, terms of payment and placement fee for contingency base searches.
- ITAT outlined that the non-resident company had no PE in India and was working only as a placement service.
- ITAT observed that the referred candidate is technical expert or not in the particular field is on the sole discretion of the assessee company.
- ITAT noted that there is no specific technical expertise involved from the non-resident company and thus does not constitute as FTS as per Sec. 9(1)(vii) and TDS u/s. 195 will not be applicable.
- Accordingly, ITAT ruled in favour of the assessee.