INTERNATIONAL TAXATION

CA. Hinesh Doshi, CA. Jhankhana Thakkar

Taj TV Limited vs. Deputy Commissioner of Income Tax, International Taxation Circle 4(1)(2), Mumbai [TS-163-ITAT-2023(Mum)] dated 31st March, 2023

Facts:

- The Assessee is a Mauritian company and step down subsidiary of Zee entertainment Enterprises Ltd. (Zee).
- In AY 2017-18, the assesse entered into a business purchase agreement to sell the sports broadcasting business i.e. Ten Sports along with all assets, right, title and interest of the assessee in the sports broadcasting business to Aqua Holding (a Mauritian Co. and subsidiary of Sony Pictures) on going concern basis by way of slump sale for a consideration of USD 338.4 million.
- Revenue held that gains of Rs.1790 Cr arising out of sale of sports broadcasting business of assessee to Aqua Holding (a step-down subsidiary of Sony) on going concern basis through slump sale, was taxable in India.
- Aggrieved, the assessee filed an appeal with the ITAT.

Issue:

Whether the Capital Gain on slump sale on Zee-Sony Ten Sports deal is taxable in India?

Held:

- ITAT rejected revenue's contention that assessee had fixed place PE in India and consequently the gain was taxable in terms of Article 13(2) of India-Mauritius DTAA.
- ITAT stated that in absence of PE in India (Dependent Agent or Fixed Place), Article 13(2) would not be applicable and thus, in terms of Article 13(4), the gains would be taxable in state of residence of the assessee i.e. Mauritius.
- Revenue held that assessee had shifted its play out facilities to India during the year, pursuant to agreement entered into with Zee whereby centre at Noida provided by Zee constituted its fixed place PE and accordingly attributed the gains from the slump sale to such alleged fixed place PE.
- ITAT held that although a fixed place through the play out centre exists, it was neither at assessee's disposal nor was assessee's business carried out from such fixed place.
- ITAT stated that "Unless, there are specific evidences led by the revenue that it was not the business of the service provider but the business of the assessee itself was carried on from those play out facilities, fixed place permanent establishment of assessee cannot be established."
- Thus, ITAT ruled in the favour of the assessee.

Dieffenbacher GMBH vs. Assistant Commissioner of Income Tax, International Taxation Circle 2(1)(2), Mumbai [TS-147-ITAT-2023(Mum)] dated 16th March, 2023

Facts:

- The assessee, is a non-resident corporate entity incorporated in Germany with PE in India.
- Assessee made payment of Rs. 17.13 crore to a Belgium based subcontractor towards commissioning and installation services of dryer fans by adopting restrictive definition of FTS in terms of India-Portugal DTAA.
- Revenue held that assessee received managerial, technical and consultancy services from CBV which falls within the ambit of FTS in terms of Article 12(4) of India-Belgium DTAA and DRP confirmed Revenue's view.

- Aggrieved, the assessee filed an appeal with the ITAT.

Issue:

- Whether services for installation & commissioning of dryer fans will be considered as FTS?

Held:

- ITAT observed that the assessee has not been found to have "made available" any technical knowledge experience or knowhow and therefore, cannot be taxed as FTS.
- Relying on co-ordinate bench ruling in GRI Renewal and Essity Hygiene & Health wherein it was held that CBDT Circular No. 3 of 2022 dated. Feb 3, 2022 specifying the need for a separate notification for importing the beneficial treatment from another DTAA cannot have a retrospective effect and accordingly, cannot be invoked for the relevant assessment year.
- ITAT held that assessee is entitled to claim the benefit of the restricted definition under India-Portugal DTAA and the services cannot be considered as FTS due to non-fulfilment of "make available" condition, allows invocation of Most Favoured Nation (MFN) Clause under India-Portugal DTAA.
- Thus, ITAT ruled in the favour of the assessee.

M/s. Samsung C & T Corporation vs. Commissioner of Income Tax (International Taxation)-3, Dehradun [TS-146-ITAT-2023(DEL)] dated 24th March, 2023

Facts:

- Assessee is a South-Korea based Company that formed a consortium with its Indian subsidiary, Samsung C & T India Pvt. Ltd (Samsung India), to bid for a contract from Delhi Metro Rail Corporation (DMRC).
- Being successful in the bid, DMRC awarded two separate contracts: (i) for offshore CIF supply of plant and equipment, and (ii) onshore supply and services including custom clearance, transport, erection, installation with Samsung India.
- For AY 2014-15, assessee filed Nil return as offshore supply of plant and equipment were made outside India as also the transfer of titled passed outside India, thus no taxable event occurred in India.
- Assessee also filed an application before AAR on taxability of receipts from offshore supply of equipment and pending such application, revenue initiated assessment proceedings and CIT invoked jurisdiction under section 263.
- Aggrieved, the assessee filed an appeal with the ITAT.

Issue:

- Whether offshore supply of plant and equipment will be taxable in India?

Held:

- ITAT observed that the goods were supplied from outside India and the transfer of title over the goods passed in favour of DMRC outside India, further the payments for offshore supply were made in foreign currency through letter of credits and the same were received by the assessee in Korea.
- ITAT considered that the copies of the invoices, bill of lading and bill of entry furnished by Assessee demonstrating that goods were consigned directly to DMRC from Korea.
- Relying on SC ruling in Ishikawajma-Harima, ITAT held that "CIT being conscious of the fact, that proceeding is pending before AAR, should not have initiated proceedings under Section 263 of the Act as two parallel proceedings on the same issue, cannot be initiated at a given point of time."
- Thus, ITAT ruled in the favour of the assessee.