CA. Hinesh Doshi, CA. Pramita Rathi

The Deputy Commissioner of Income Tax (International Taxation), Circle 1(1) vs. M/s. Jeans Knit Pvt. Ltd. [TS-472-HC-2020 (Karnataka)] dated 10th September, 2020

Facts:

- The assessee company, 100% EOU, was engaged in the business of manufacturing and export of garments.
- The assessee made payment to a non-resident company for various services such as inspection of fabrics, timely dispatch of material etc without deduction of TDS.
- The assessee made payments to non-resident company without deduction of TDS. The AO held assessee as assessee in default.
- AO held the assessee in default for non-deduction of TDS and treated the non-resident company as provider of technical services which was covered under the scope and ambit of Section 9(1)(vii) of the Income Tax Act, 1961 ('the Act).
- ITAT ruled in favour of assessee. Aggrieved, Revenue filed an appeal before the HC.

Issue:

- Whether services provided by non-resident company are technical services and payment made by the assessee to non-resident Company falls within the ambit of FTS as contemplated u/s 9(1)(vii) of the Act?
- Whether provisions of Section 195(1) of the Act are attracted?

Held:

- HC observed that the non-resident company was not involved either in identification of the exporter or selection of the material and negotiation of the price.
- HC further noted that the quality of material was determined by the assessee and non-resident company was only required to make physical inspection of the material to examine if it resembles the quality specified by the assessee.
- The non-resident company was required to ensure coordination with the suppliers, so that goods were shipped on time and to undertake necessary coordination and ensure that correct quantity and quality of goods were shipped to assessee.
- HC held that "for rendering aforesaid services, no technical knowledge is required." Thus, services rendered by non-resident company does not fall within the ambit of FTS and TDS u/s. 195 is not applicable.
- Accordingly, HC ruled in favour of the assessee.

ACIT vs. M/s. Gepach International [TS-476-ITAT-2020(Mum)] dated 15th September, 2020

Facts:

- The assessee company was engaged in the business of export of pharmaceutical and nutraceutical products.
- The assessee did not withheld tax on the payments made to non-resident agent towards reimbursement for marketing and sales promotion activities and export commission on sales made in Russia.
- AO was of the view that payments made were in the nature of managerial or technical service on which TDS was liable to be withheld u/s. 195 of the Act.
- AO disallowed the payments on which TDS was not deducted.
- CIT(A) deleted the addition made by AO. Aggrieved, the Revenue filed an appeal before Mumbai ITAT.

Issue:

- Whether payment made as reimbursement of expenses are covered u/s 9(1)(vii) of the Act and chargeable to tax as fees for technical services in India?

Held:

- ITAT observed that the non-resident agent provided marketing support services as per marketing and promotion strategies devised by the assessee.
- ITAT noted that the assessee retained full control over all the marketing activities in Russia and agent was simply implementing the same.
- ITAT opined that payment made to non-resident agent towards services rendered outside India, the payee had no business connection in India and services provided by agents were not managerial in nature.
- ITAT held that payments made were not covered u/s 9(1)(vii) of the Act and not chargeable to tax as fees for technical services in India.
- Accordingly, ITAT ruled in favour of the assessee.

Turner Broadcasting System Asia Pacific Inc. vs. DDIT, Circle – 2(2), International Taxation [TS-512-ITAT-2020 (DEL)] dated 30th September, 2020

Facts:

- The assessee company, incorporated in USA derived advertisement and distribution revenue from grant of exclusive rights to Turner International India Pvt. Ltd. (TIIPL).
- TIIPL, as per the agreement was granted rights to distribute the products to various cable operators and the distribution revenue so collected by TIIPL was to be shared between the assessee and TIIPL.
- Further, in accordance with MAP proceedings of earlier years, the assessee had consistently offered 10% of the advertising and subscription revenue received from Indian sources as business income.
- AO treated this income as royalty as per Section 9(1)(vi) and Article 12 of India-USA DTAA.
- Aggrieved, the assessee filed an appeal with the ITAT.

Issue:

- Whether the advertising and subscription revenue falls within the ambit of Royalty as per Section 9 (1) (vi) and Article 12 of India-USA DTAA?

Held:

- ITAT observed that the sole ownership of the rights and the contents of the products was of the assessee company and Indian company had no right to copy, modify or alter the content therein.
- ITAT held that the assessee-company only granted commercial rights in the nature of 'broadcast reproduction right' to the TIIPL, which was separately defined u/s. 37 of the Copyright Act and not reckoned as a 'Copyright' under the said Act.
- ITAT, therefore concluded that "it cannot be held that revenue derived by the assessee for distribution of products is taxable as 'royalty' albeit it is a business income of the assessee."

- Further, AO took a different view from earlier years wherein 10% of the revenue received was charged as business income in India following the MAP order.
- Thus, ITAT accepted assessee's contention and held that the revenue should not be treated as Royalty u/s. 9 (1)(v) and Article 12 of DTAA following the rule of consistency.
- Accordingly, ITAT ruled in favour of the assessee.

Telstra Singapore Pte Ltd vs. DCIT (International Taxation) [TS-517-ITAT-2020(DEL)] dated 30th September, 2020

Facts:

- The Assessee company, a tax resident of Singapore was engaged in the business of providing bandwidth services.
- AO held that amount received by the assessee from Indian customer for provision of bandwidth Services were in the nature of royalty and taxable as per section 9 (1) (vi) of the Income Tax Act, 1961 and Article 12(3) of the India-Singapore DTAA.
- Aggrieved, the assessee filed an appeal before ITAT.

Issue:

- Whether amount received by assessee from Indian customers for provision of bandwidth services shall be taxable as royalty under section 9(1)(vi) of IT Act and Article 12(3) of India-Singapore treaty?

Held:

- Relying on the HC ruling in the case of Asia Satellite Telecommunication Co. Ltd. and New Skies Satellite BV, ITAT held that prior to amendment by Finance Act 2012, section 9(1)(vi) was pari-materia with the definition of Royalty as per treaty.
- ITAT held that mere receipt of service using equipment under the control, possession and operation of service provider would not be treated as Royalty under the Act or the Tax Treaty.
- Relying on Bombay HC Ruling in CIT vs Reliance Infocomm Ltd., ITAT held that mere amendments in the Act would not override the provisions of Double tax Avoidance Agreement.
- Relying on the Delhi HC ruling in the case of Asia Satellite Telecommunication Co. Ltd. it held that only using lease lines for transmitting data would not be considered as equipment royalty.
- Accordingly, ITAT ruled in favour of the assessee.

Damco International A/S v. DCIT (International Taxation) [2020] 118 taxmann.com 37 (Mumbai Tribunal) dated 20 July 2020

Facts: The assessee, a Denmark based company, was engaged in the business of shipping and logistics. During the relevant year, the Assessee incurred certain costs towards procurement of insurance, accounting software, travel, fixed assets (computer servers), etc. at group level which was subsequently reimbursed by various group entities, including India. The Assessee claimed that such reimbursement received from the Indian group entity was not liable to tax in India as it does not have a PE in India.

The AO denied such claim and held that the payment received by the Assessee was towards access to group IT network systems as well as related maintenance and support services and hence such amount is taxable as 'fees for technical services' under article 13 of India-Denmark DTAA. The AO further held that the employees of the Assessee visiting India rendered managerial and technical services to the Indian group entity.

Aggrieved, the Assessee filed an appeal before the Mumbai Tribunal.

Issue: Whether reimbursement of administrative services costs received by the Assessee is taxable in India as 'fee for technical services' under article 13 of India-Denmark DTAA?

Held: The Hon'ble Tribunal observed that the Assessee acts as the central coordinator for all Damco entities across the globe. Also, the services/procurement rendered by the Assessee is in the nature of coordinating services, whereby various costs incurred are pooled together and recovered as reimbursement of costs based on various allocation keys (such as the number of Headcount/Headcount usage/Number of users/Country operational cost/Country revenue, etc.) which is uniformly applied across the group. The Tribunal also observed that such costs were recovered without any mark-up.

The Tribunal held that such reimbursement of costs incurred by the Assessee towards business support services/ administrative services cannot be construed as managerial, technical and consultancy in nature and hence cannot be charged as fees for technical services under Article 13 of the India-Denmark DTAA. Assessee’s appeal was allowed.