INTERNATIONAL TAXATION

CA. Hinesh Doshi, CA. Jhankhana Thakkar

Amazon Web Services vs Assistant Commissioner of Income Tax, Circle-1(1)(1) , New Delhi [TS-419-ITAT-2023(DEL)]dated 1st August, 2023

Facts:

- Assessee, a US-based Company, engaged in providing 'standard and automated' cloud computing services/AWS services. Assessee is providing general /incidental support services to its customers and does not involve any transfer of technology or knowledge but only enables them to effectively access the AWS Services in an appropriate and efficient manner.
- Assessee received Rs.247.68 Cr. and Rs.1,007.81 Cr respectively, from its customers in India for providing standard and automated cloud computing services.
- Revenue held the entire receipts to be taxable in India as FIS/FTS and royalty under Article 12(3) of India- US DTAA.
- Aggrieved, the assessee filed an appeal with the ITAT.

Issue:

- Whether cloud computing services provided by Amazon Web Services, Inc. will be considered as FIS/FTS and royalty?

Held:

- ITAT reiterated the principle for taxability, that the services should 'make available 'the technical knowledge, experience, skill, know-how or processes, which enables the service recipient to utilize the same in future on its own without the help of service provider.
- Relying on jurisdictional HC ruling in Sheraton International, Ahmedabad ITAT ruling in Veeda Clinical Research and Madras HC ruling in VA Noord, Pune ITAT ruling in SunGard and Mumbai ITAT ruling in Rack space, wherein it was held that rendering cloud computing service cannot be held to be liable to tax in India as FTS/FIS.
- On taxability of Royalty, ITAT noted that as per sample customer agreement, trademark guidelines and support services guidelines, the prerequisites for taxation as royalty under Article 12(3) of the India-USA DTAA are not met as the customer do not receive any right to use the copyright or other IP involved in the services.
- Relying upon Pune ITAT ruling in EPRSS, Bangalore ITAT ruling in Urban Ladder, Hyderabad ITAT ruling in Reasoning Global, Delhi ITAT ruling in Microsoft Regional Sales and jurisdictional HC ruling in MOL Corporation, wherein it was held that the payments made to the assessee for cloud computing services do not qualify as royalty under the India-USA DTAA.
- Thus, ITAT ruled in the favour of the assessee.

GE Precision Healthcare LLC vs Assistant Commissioner of Income Tax, International Taxation, Circle- 1(3)(1),New Delhi [TS-456-ITAT-2023(DEL)] dated 14th August, 2023

Facts:

- Assessee is a non-resident corporate entity and tax resident of USA. Assessee received Rs.10.66 Cr for AY 2020-21 as the reimbursement of software licence fee from its Indian AEs viz., Wipro GE Healthcare Pvt Ltd., GE BE Pvt Ltd. and GE India Industrial Pvt Ltd which was not offered to tax in India.
- Revenue held that the said receipts are to be treated as income from other sources under Section 56(1) and Article 23(3) of the India-US DTAA.
- Aggrieved, the assessee filed an appeal with the ITAT.

Issue:

- Whether the services provided by the assessee will be treated as income from other sources under section 56(1) and Article 23(3) of India-US DTAA?

Held:

- ITAT observed that the sub-licensing fees is business income under Article 7 of the India-USA DTAA but not taxable due to absence of PE in India.
- ITAT opined that that taxability of a particular income falling under any Article of the DTAA is subject to fulfilment of the conditions laid down in the applicable Article, however, if the income is not taxed due to non-fulfilment of such conditions, the same cannot automatically be re-characterized as other income under Article 23
- ITAT observed that an income falls under the residuary head of 'income from other sources', when it cannot be categorised as income from salary, house property, business and profession and capital gain, similarly, Article 23(3) of the India-US DTAA provides for taxation of residuary items of income which are not dealt with in the other Articles.
- ITAT opined that, "the income in dispute, since can be classified under other Articles of the tax treaty, they cannot be brought under the residuary provision contained under Article 23 of the tax treaty".
- ITAT held that the Revenue was wrong in treating the said receipts as income from other sources under Section 56(1) and Article 23 of India-US DTAA.
- Thus, ITAT ruled in the favour of the assessee.

Leapfrog Financial Inclusion India (II) Ltd vs Assistant Commissioner of Income Tax, International Taxation, Circle- 2(2)(1),New Delhi [TS-455-ITAT-2023(DEL)] dated 11th August, 2023

Facts:

- Assessee is a non-resident corporate entity incorporated in Mauritius and is a tax resident of Mauritius. It is a wholly owned subsidiary of another Mauritius entity i.e. Leapfrog Financial Holdings Ltd.
- The assessee is an investment holding company and holds a Category 1 Global Business License issued by the Mauritius Financial Services Commission.
- Assessee derived short-term and long-term capital gains on sale of unlisted equity shares acquired during AY 2015-16 and 2016-17 and claimed exemption under Article 13(4) of India-Mauritius DTAA.
- Revenue denied the claim of exemption and held that the decisions relating to investment activities including management decisions were taken outside Mauritius yet the assessee claimed treaty benefit for tax purposes, accordingly, applied the doctrine of substance over form and held the capital gain to be taxable.
- Aggrieved, the assessee filed an appeal with the ITAT.

Issue:

- Whether the capital gains will be taxable as per India- Mauritius DTAA?

Held:

- ITAT observed that once the assessee is a valid TRC holder issued by a competent authority of Mauritius, it proves assessee's residential status as a tax resident of Mauritius and the revenue cannot go behind the TRC which is evident from the Circular No. 786 dated Apr 13, 2000 wherein it was clarified that TRC shall serve as sufficient evidence of taxpayer's residence and beneficial ownership for applying the DTAA.
- ITAT remarked that "if the Assessing Officer was of the view that the capital gain derived from transfer of unlisted equity shares is an impermissible tax avoidance arrangement in terms of Section 95, it should have proceeded in accordance with Section 144BA read with Rule 10UB, however, there is nothing on record to suggest that Revenue has invoked the aforesaid provisions."
- Relying on SC ruling in Azadi Bachao as well as jurisdictional HC ruling in Blackstone Capital to hold that the Revenue cannot go behind the TRC issued by the other tax jurisdiction which is sufficient evidence for claiming eligibility for DTAA benefit.
- ITAT allowed the the benefit of Article 13(4) of India-Mauritius DTAA on capital gain from investments in unlisted equity shares.
- Thus, ITAT ruled in the favour of the assessee.