Lease Plan India Pvt. Ltd vs. Deputy Commissioner of Income Tax, Circle-4(1) [TS-282-ITAT-2020(DEL)] dated 15th June, 2020

Facts:

The assessee company was engaged in the business of leasing of motor vehicles, financial services and fleet management.

AO noted that the assessee paid guarantee charges to its Dutch holding co., associated enterprise (AE) based in Netherlands without deduction of tax at source on the contention that these payments were in the nature of reimbursement against actual expenses and therefore not chargeable to tax in India.

AO opined that these expenses were in the nature of fees for technical services and therefore tax was liable for tax deduction.

AO disallowed these expenses u/s. 40(a)(i) of the Income Tax Act,1961.

Aggrieved, the assessee filed an appeal before ITAT.

Issue:

Whether the assessee was liable to withhold tax u/s. 195 on the guarantee fee paid to its overseas AE?

Held:

- ITAT observed that the AE had not provided any capital to the assessee on which interest would be earned but had given a corporate guarantee to the lender bank on the terms that if the assessee failed to pay the amount due, the loan would be settled by AE.
- ITAT stated that in absence of provision of capital or any "debt claim and form" such payment would not qualify as interest and therefore would not be covered under Article 11 of the India-Netherlands DTAA.
- ITAT noted that the service provided by the overseas AE was a financial service and cannot be termed as "Consultancy Service".
- Moreover, ITAT held that the service did not meet the "make available" condition for it to be FTS and therefore the payment cannot be treated as FTS under Article 12 of the DTAA.
- Relying on the ruling in the case of Johnson Matthey Public Ltd wherein it was upheld that guarantee fee was taxed as 'other income', ITAT observed that the India- Netherlands DTAA did not have an article for "Other Income".
- Further, ITAT observed that in absence of PE in India, taxability could not be invoked under Article 7 and thus deleted the disallowance u/s 40(a)(i).
- Accordingly, ITAT ruled in favour of the assessee.

Deputy Director of Income Tax, Circle-2(2) vs. M/s. Yum! Restaurants (Asia) Pte. Ltd., [TS-336-ITAT-2020(DEL)] dated 06th July, 2020

Facts:

- The assessee, a Singapore based company, entered into a Technology License Agreement (TLA) with an Indian company, which had appointed various franchisees that were operating restaurants in India under their respective brand names.
- AO observed that a person employed by the assessee, working for the Indian entity, was seconded to India, and the salary of the said person was reimbursed by the Indian company.
- AO treated this reimbursement of salary as FTS under Article 12 of the India-Singapore DTAA.
- AO also noted that there was existence of service PE/DAPE in India and had sought for attribution of business income to the PE on account of marketing activities undertaken by Indian affiliate.
- Aggrieved by the ruling passed in favour of the assessee by CIT (A), revenue filed an appeal before ITAT.

Issue:

- Whether the salary reimbursement of the employee constituted as FTS and would it be attributable to service PE?
- Whether the business income on account of the marketing activities undertaken by the Indian entity be taxable in the hands of the assessee as service PE?

Held:

- ITAT observed that the said employee not only attended the Board Meeting but also signed the financial statements of the Indian entity in his capacity as Director.
- ITAT also noted that, for taxability of the service PE, the salary expenses were required to be deducted from the business income which was Nil in the present case.
- ITAT held that, as per Article 12 of the DTAA, the clause of 'make available' needs to be fulfilled to hold existence of PE for technical services. In absence of the same, it was not possible to hold that there was taxability as FTS.
- ITAT also observed that the employee had paid taxes in India on the aforementioned salary, and therefore the same cannot be taxed again in the hands of the assessee.
- Further, ITAT held that there was no DAPE in India as none of the conditions under Article 5(8) of the DTAA were satisfied.
- Referring to the Delhi HC ruling in the case of Centrica India Offshore Pvt. Ltd, ITAT stated the same cannot be said to apply here as in the present case, the overseas company provided services to the Indian Company through seconded employees.
- Accordingly, ITAT ruled in favour of the assessee.

Van Oord Dredging and Marine Contractors BV vs. Deputy Commissioner of Income Tax [TS-252-ITAT-2020(Mum)] dated 27th May, 2020

Facts:

- The assessee, a company based in Netherlands, established a project/site office, by RBI's approval, for executing contracts in India.
- The assessee received an arbitration award in relation to the project in the current year for an appeal filed in the earlier years.
- The assessee did not add the income received in relation to the project in India as the project was completed in the earlier FY's on the contention that in the absence of any PE in India, the same would not be taxable in India as per Article 5 r.w. Article 7 of the India- Netherlands DTAA.
- AO disagreed and taxed income in India and levied penalty u/s.271(1)(c) during the assessment proceedings.
- Aggrieved, the assessee filed an appeal before ITAT.

Issue:

- Whether excluding the arbitration reward received by the assessee in the return filed would result in inaccurate or incomplete return?

Held:

- ITAT observed the fact that the assessee did not include the arbitration award in the return filed would not result to furnishing of inaccurate particulars to income as claiming or not claiming of the same was a matter of perspective of the assessee.
- ITAT ruled that just because the interpretation was not acceptable to the AO, it would not render the return incorrect.
- Also, ITAT noted that at the time of filing of the return the assessee explained the reasons for not including the amount in question received as "arbitration award" in its taxable income.
- ITAT stated that the assessee did not have any PE in India for the project at the time of receiving the arbitration award and therefore the same cannot be brought to tax in India.
- ITAT ruled that there was neither any concealment of particulars of income nor furnishing of inaccurate particulars of income by the assessee and therefore penalty u/s 271 (1)(c) cannot be imposed on the assessee.
- Accordingly, ITAT ruled in favour of the assessee.