M/s. SQS India BFSI Ltd. vs. The Deputy Commissioner of Income Tax, Corporate Circle 6(2), Chennai [TS-442-ITAT-2021(CHNY)] dated 03rd May, 2021

Facts:

The assessee company, an India-based software service provider was primarily engaged in delivering software validation and verification services to the banking and financial services industry worldwide.

The assessee made payment of commission to foreign agents without deduction of TDS.

During the assessment proceedings, AO opined that such expenditure towards payment of commission was in the nature of fees for technical services and therefore was subject to TDS.

Accordingly, AO brought such expenditure to tax under section 40(a)(ia) of the Income Tax Act, 1961.

Aggrieved, the assessee filed an appeal before ITAT.

Issue:

Whether the commission payment made was liable to tax in India?

Held:

ITAT observed that the foreign agents had no permanent establishment (PE) in India and were residents of their respective foreign countries.

ITAT noted that the non-resident agents to whom commission was paid by the assessee had rendered services outside India for sourcing orders from the clients.

ITAT noted that the services rendered by the foreign agents were essentially brokerage/commission service for procuring orders to the assessee.

ITAT stated that as the foreign agents had no PE in India, there would be no liability, either under the domestic law or under Double Taxation Avoidance Agreement.

ITAT held that the commission was not taxable in India and moreover the assessee was not liable to deduct tax on such payment.

Relying on the decision in the case of Evolv Clothing Company Pvt. Ltd. v. ACIT (supra), ITAT held that commission payment would not be taxable in India.

Accordingly, ITAT ruled in favour of the assessee.

M/s. Prime Oceanic Pvt. Ltd. vs. The Income Tax Officer, Ward -2(3), Alwar (Raj) [TS-450-ITAT-2021(JPR)] dated 14th June, 2021

Facts:

The assessee company, a commissioning agent, was engaged in providing shipping services to its clients at various ports located all over the world.

The assessee availed services of a UAE based company which was engaged in the transport of Heavy Lift, Project and Wet Bulk and Dry Bulk cargos across all oceans of the world, in order to represent assessee company in UAE shipping market.

The assessee made certain payments to the UAE company towards sales promotion expenses.

AO observed that the assessee did not deduct TDS u/s 195 on above expenditure and disallowed the said expenditure.

Aggrieved, the assessee filed an appeal before ITAT.

Issue:

Whether the overseas payment made was liable to tax in India?

Held:

ITAT observed that the UAE entity was appointed as the sole service provider to promote the activities and services provided by the assessee company by contacting and reaching out to companies based in UAE.

ITAT noted the relationship between assessee company and UAE entity was that of principal and agent and not that of joint venture partners, which carried entirely different attributes.

ITAT held that the nature of the payments was therefore of sales promotion expenditure for services rendered outside India where the corresponding revenues had been offered to tax by the UAE entity.

ITAT observed that the sum paid to the agent did not fall under the scope of total income and in the absence of permanent establishment (PE) in India, no business income would be charged to tax in India.

ITAT held that sales promotion expenditure paid and credited would not fall in the category of the income received or deemed to be received in India or accrue or deemed to be accrued in India.

Relying on the decision in the case of GVK Industries (supra), ITAT ruled that the amount paid to the non-resident entity did not fall in scope of taxability in India.

Accordingly, ITAT ruled in favour of the assessee.

M/s. QlikTech International AB vs. The Deputy Commissioner of Income Tax, International Taxation, Circle – 2(2), Bengaluru [TS-537-ITAT-2021(Bang)] dated 06th July, 2021

Facts:

The assessee, a company incorporated in Sweden, was engaged in the business of sale of software products and rendering information technology services.

The assessee entered into an agreement with its subsidiary for onward sale of shrink-wrapped software to the end users/customers in India as per the distribution/license agreement.

During the assessment proceedings for the Nil return filed by the assessee, AO passed an order, where it held the entire receipts from sale of software products taxable as royalty under Article 12(3) of India- Sweden DTAA and u/s 9(1)(vi) of the Income Tax Act, 1961.

Aggrieved, the assessee filed an appeal before ITAT.

Issue:

Whether the receipts from sale of software products was taxable in India?

Held:

Relying on the decision in the case of Engineering Analysis Centre of Excellence, ITAT held that payment towards sale of software was not taxable in India.

Relying on the ruling in the case of Sandvik AB, ITAT stated that the assessee was entitled to take the benefit of MFN Clause, relying on the provisions of Article 12(4)(v) of the Inda- Portuguese DTAA and claim that the receipts would be brought to tax only if the services provided makes available technical knowledge, experience, skill, etc., to the person acquiring the services.

ITAT observed that the services were purely in the nature of back-office services, and nothing could be regarded as having been made available to the recipient of services.

ITAT observed that as per the terms of the Service Agreement, it was clear that the assessee only provided corporate back-office services to Indian subsidiary and such services were not consultancy services and the same did not involve transfer of any technical knowledge or skill or experience to the recipient.

ITAT held that the sum received towards said services were not in the nature of FTS and could not be brought to tax in India as "FTS".

ITAT also held that the sum in question could not be taxed as business profits also, as under Article 7(1) of DTAA, as the receipts in question could not be attributed to the permanent establishment (PE).

Accordingly, ITAT ruled in favour of the assessee.