AGT International GmbH vs. Deputy Commissioner of Income Tax (IT) [TS-57-ITAT-2020 (Mum)] dated 31st January, 2020

Facts:

- The assessee, a tax resident of Switzerland offered fees for technical services received from an Indian company at 10% on gross basis under Article 12 (2) of the Indo Swiss Tax Treaty.
- AO was of the view that the services rendered by the assessee does not satisfy the criterion under Article 12(4) which deals only with 'payments of any kind to any person in consideration for rendering of any managerial, technical or consultancy services, including the provision of such services by technical or other personnel'.
- AO noted that the Indian Company had withheld tax at 42.024% on the entire amount.
- AO held the assessee a service PE under article 5(2)(1) of the treaty on account of rendition of these services in India.
- Thus the expenses were allowable on an estimated basis of 40% of the total revenue and the remainder amount was taxable at the normal income tax rates applicable to the foreign companies.
- Aggrieved, assessee filed an appeal before Mumbai ITAT.

Issue:

Whether the FTS received by the assessee should be taxed at 10% on gross basis under Article 12(2) of India-Swiss DTAA?

Held:

- ITAT accepted assessee's contention that the assessee had a choice to be taxed on gross basis at the rates provided under Article 12 of the treaty so far as the PE under Article 5 of the Indo Swiss DTAA was concerned.
- ITAT interpreted that 'A combined reading of Article 5 read with related protocol clause showed that a service PE being triggered on account of rendition of services in India or vice versa does not make the assessee worse off so far as the tax liability in source jurisdiction was concerned.
- Further, ITAT explained that unless the assessee has a lower tax liability on taxability of PE on net basis under Article 7 as against taxability of FTS on gross basis under Article 12, PE being triggered becomes tax neutral.
- Taking cognizance of the words "At the request of the enterprise" in the protocol provision related to Article 5 (2) (1), the assessee's plea for taxability under Article 12 was accepted.

- Accordingly, ITAT ruled in favour of the assessee.

Media World Wide Pvt. Ltd. vs. Commissioner of IT, Kolkata-I (TDS) [TS-7-HC-2020 (CAL)] dated 8th January, 2020

Facts:

- The assessee, engaged in the business of media broadcasting and telecasting, made payments on account of up-linking charges and down-linking charges, bandwidth and air time charges after deduction of TDS u/s. 194C.
- AO held that these payments fall in the nature of fees for professional and technical services and TDS u/s. 194J was applicable.
- On appeal before CIT against AO's order, CIT ruled in favour of the assessee.
- Aggrieved, the Revenue filed an appeal with ITAT which ruled in favour of the assessee.
- Further aggrieved, the Revenue filed an appeal with the Calcutta High Court.

Issue:

- Whether these payments made for up-linking charges and down-linking charges, bandwidth and air time charges fall in the nature of fees for professional and technical services?
- Whether TDS u/s. 194J will be applicable on these payments?

Held:

- HC clarified that the definition of "work" u/s. 194C is inclusive and specifically includes broadcasting and telecasting.
- HC noted that the companies with which the assessee entered into agreements held license from Central Ministry pursuant to which a mechanised and automated platform is created for up-linking and broadcasting of programmes in electronic media.
- HC remarked that anybody desirous of using such a platform for up-linking and broadcasting can do so by making a payment of prescribed fee, which will not be in the nature of technical services.
- Relying on the plethora of judgments given by Delhi HC for Bharti Cellular and ESTEL Communication, Madras HC for Skycell communications, Karnataka HC for De Beers India, Bombay HC for UTV Entertainment and Supreme Court ruling in case of Kotak Securities etc., HC opined that the TDS u/s. 194C would apply.
- Accordingly, HC dismissed Revenue's appeal and ruled in the favour of the assessee.

RSV Global vs. Income Tax Officer, (International taxation & TP), Bhopal [TS-56-ITAT-2020(Ind)] dated 28th January, 2020

Facts:

- The assessee, an Indian company, engaged in trading activity of yellow peas, grains, etc., filed form No. 15 CA for remittance of various payments to non-residents against import of agro-commodities.
- A.O. issued a letter for verification of payments without deduction of tax at source u/s 195 of the Act.
- AO was not satisfied with the explanation received for non-deduction of TDS and treated the assessee in default for non-deduction of TDS on these remittances.
- Aggrieved, the assessee filed an appeal before Indore ITAT.

Issue:

- Whether the assessee was liable to withhold tax on the various remittances to non-residents?

Held:

- ITAT ruled that even if the assessee earned 52% of revenue from the non-resident, it would not make the agent working mainly for non-resident.
- ITAT held that the agent did not secure orders but only forwarded the orders to the non-resident entity which in turn secured, concluded and executed the order.
- ITAT stated that the agent was a general commission agent having independent status and agency clause under explanation (2) to sec 9(1)(i) would not be attracted.

- Relying on the case of Hindustan Shipyard Ltd, it was held that the non-resident companies had no business connection in India and therefore the assessee was not liable to deduct TDS u/s 195.
- Accordingly, ITAT ruled in favour of the assessee.

CMA CGM SA vs. Deputy Commissioner of Income Tax International Taxation [TS-815-ITAT-2019(Mum)] dated 30th December, 2019

Facts:

- The assessee, a non-resident company, incorporated in France, was engaged in shipping business in International Waters.
- The assessee claimed relief under Article 9 (1) of India-France DTAA against revenue earned from the shipping business in International Waters.
- The assessee held that its Indian Agent CMA CGM Agencies (India) Pvt Ltd cannot be considered as its agency PE, when it has been remunerated at ALP.
- AO rejected the claim of the assessee in respect of above receipts and sought to tax them u/s 44B of the Income Tax Act.
- Aggrieved, the assessee filed an appeal before ITAT.

Issue:

- Whether Indian Agent of the assesse can be considered as agency PE as per Article 5 of India-France DTAA?

Held:

- ITAT held that Indian agent would be construed as independent agent if the agent has been remunerated at arm's length and no agency PE would exist in terms of DTAA.
- It was also held that the question of existence of PE arises only if income was liable to be taxed as business income.
- The income of the assessee was not taxable as business profits as the assessee's income was eligible for relief u/s. 9 (1) of DTAA. Hence, the question of existence of PE becomes academic.
- Accordingly, the appeal was allowed in favour of the assessee.