M/s. ABB AB C/o. ABB India Limited vs. Deputy Commissioner of Income Tax (International Taxation), Circle 1(1), Bangalore [TS-438-ITAT-2020(Bang)] dated 31st August, 2020

Facts:

- The assessee company, a tax resident of Sweden, was engaged in power and automation technologies for utility and industry customers.
- AO disallowed a part of the refund in respect of TDS credit on the contention that the assessee was not eligible to claim TDS Credit on offshore supply as it was not offered to tax earlier.
- Aggrieved, the assessee filed an appeal before ITAT.

Issue:

- Whether the offshore supply was taxable in India?
- Whether the assessee was eligible for refund of TDS credit?

Held:

- ITAT observed that the title in the equipment was passed on by the assessee company outside India and the payments pertaining to offshore supply were received by the company outside India.
- ITAT stated that since TDS was deducted in India even though the off-shore supply contracts were not taxable in India, the assessee would become eligible to claim TDS credit.
- Relying on the case of Arvind Murjani Brands (P) Ltd. and Peddu Srinivasa Rao, ITAT held that the assessee was entitled to credit for TDS, even though no income was assessable in his hands.
- ITAT also held that the assessee had invoked MAP and CBDT resolution was applicable as the assessee had raised similar grounds of appeal earlier for short deduction of TDS and the decision made then would also be applicable in this particular case.

- Accordingly, ITAT ruled in favour of the assessee for statistical purposes.

M/s. Esm Sys Pvt. Ltd. vs. The ITO, Ward-2(1)(1), Ahmedabad [TS-347-ITAT-2020(Ahd) dated 09th July, 2020

Facts:

- The assessee company made payments to an overseas company for obtaining the services of Web Promotion, social media management etc.
- The assessee did not withheld tax on the payments made overseas for the services obtained to the tune of data promotion, social media management and general consulting.
- AO was of the view that payments made were in the nature of technical or management services or execution of contract on which TDS was liable to be withheld u/s. 195 of the Income Tax Act, 1961.
- AO also stated that the assessee failed to furnish Form 15 CA and 15 CB which were mandatory to be filed at the time of making remittances. Accordingly, AO disallowed the payments on which TDS was not deducted.
- Aggrieved, the assessee filed an appeal before ITAT.

Issue:

- Whether TDS was liable to be withheld on payment made overseas company?

Held:

- ITAT observed that services which were technical in nature can be said to be "Fees for Technical Services (FTS)" only when it has made available technical knowledge or skill to the recipient of services.
- ITAT noted that there were no sharing of knowledge or know-how or any technology to the assessee as prescribed in Article 12 of the India- USA DTAA.
- Relying on the case of Pinstorm Technologies (P.) Ltd. and Right Florist, ITAT held that these payments were not taxable in India.
- Accordingly, ITAT ruled in favour of the assessee.

BOEING India Pvt. Ltd. vs. ACIT, Circle- 5(1), New Delhi [TS-404-ITAT-2020(DEL)] dated 17th August, 2020

Facts:

- The assessee company reimbursed the salary cost and other allowances of its expatriate employees to its overseas Associated Entities (AE).
- Referring to the terms of secondment agreement and drawing support from the decision in the case of "Centrica India Offshore India Ltd", AO disallowed these remittances on the grounds of non- deduction of TDS u/s 40(a)(i) of the Income Tax Act, 1961 ("Act").
- Aggrieved, the assessee filed an appeal before ITAT.

Issue:

- Whether TDS was required to be deducted on payments made in the nature of reimbursement of salary and other allowances of the expatriate employees to the overseas AE's?

Held:

- ITAT stated that the ruling in the case of "Centrica India Offshore India Ltd." was not applicable to the assessee as the facts of the case were unsimilar.
- ITAT observed that the assessee was a real and economic employer of expat employees, as they were under the control of the company without any relation with the AE's and the salary expenses were borne by the assessee.

- ITAT noted that the qualifications and role of the expats showed that they were not in the capacity to make available any knowledge and therefore these payments to the secondees were not taxable as FIS, both under the act and the relevant DTAA.
- ITAT observed that the reimbursement to the AE's were made on account of them paying salaries in the home country of the secondees.
- ITAT noted that the assessee had deducted tax at source u/s 192 and therefore the provisions of section 195 were not applicable in this case.
- ITAT also held that the assessee was eligible for tax credit as per provisions of law.
- Accordingly, ITAT ruled in favour of the assessee.

Next Gen Films Private Ltd. vs. ITO (International Tax.) TDS (4) Mumbai. [TS-409-ITAT-2020(Mum)] dated 11th August, 2020

Facts:

- The assessee company, a resident corporate entity, entered into a commissioning agreement with a UK based company to produce, complete and deliver a feature film.
- AO contended that the overseas company had PE in India and the assessee fell under the AE as per Article 10 of India-UK DTAA.
- AO stated that the assessee made remittance to the overseas company without deducting TDS.
- AO also added that the assessee participated directly or indirectly in the management and control or budgeting of the overseas company.
- Aggrieved, the assessee filed an appeal before ITAT.

Issue:

- Whether tax was liable to be withheld on payment made to the overseas company?

Held:

- ITAT observed that the contract between the assessee and the overseas company was on principal-to-principal basis.
- ITAT observed that the various conditions / stipulations requiring prior consultation of the assessee was purely with the motive of passive monitoring of the film production activity since the same was very technical in nature.
- ITAT also stated that the overseas company worked as an independent entity as it was not solely dependent upon the assessee for finance requirements and therefore the assessee could not be said to be AE of the overseas company in terms of Article 10 of the DTAA.
- ITAT held that the assessee could not be said to be PE of the overseas company and therefore the payment made was not subject to tax in India.
- Accordingly, ITAT ruled in favour of the assessee.