INTERNATIONAL TAXATION

CA. Hinesh Doshi, CA. Pramita Rathi

Deputy Commissioner of Income Tax, Circle -5 (2), Kolkata vs. M/s. Sisecam Flat Glass India Ltd. [TS-179-ITAT-2021(Kol)] dated 15th March, 2021

Facts:

- The assessee, a company, was engaged in the business of manufacturing & processing of float glass, mirror glass etc.
- During the course of assessment, AO disallowed certain expenses w.r.t loss on interest rate (hedging contract) and monitoring fees for non-deduction of TDS u/s. 40(a)(ia) of the Income Tax Act, 1961.
- The assessee filed an appeal before CIT (A) which granted relief in regard to the above disallowances.
- Aggrieved, the revenue filed an appeal before ITAT.

Issue:

Whether the expenses incurred for loss on interest rate (hedging contract) and monitoring fees would be disallowed for non-deduction of TDS?

Held:

- ITAT observed that the monitoring fees paid qualified as 'interest' both under Income Tax Act, 1961 as well as the DTAA between India and Germany.
- ITAT also held that the payment made in question was not liable to tax deduction in terms of the specific exemption granted under Article 11(3)(b) of the Indo-German DTAA.
- ITAT stated that no tax was required to be withheld u/s. 195 of the Act for the said expense and therefore the same was allowed as a deduction.
- Relying on the co-ordinate bench ruling in case of M/s. Mcleod Russel India Ltd, ITAT held that loss incurred on currency interest rate arrangements with Bank was non- speculative in nature and deductible from the profits of the business.
- Hence, ITAT ruled in favour of the assessee.

M/s. Altisource Business Solutions Private Limited vs. Asst. Commissioner of Income-tax, Circle 1 (2) (International Taxation) Bangalore [TS-184-ITAT-2021(Bang)] dated 17th March, 2021

Facts:

- The assessee, a private limited company, was engaged in providing contract software development and support services and information technology (IT) enabled services including data analysis, compilation and transmission of customized software to overseas affiliates.
- During the assessment proceedings, AO disallowed software expenses paid to non-residents by invoking the provisions of section 40(a)(ia) of the Income Tax Act, 1961 as the assessee had not withheld tax on said payments u/s 195 of the Act.
- Aggrieved, the assessee filed an appeal before ITAT.

Issue:

- Whether TDS was required to be deducted for software expenses?

Held:

- ITAT observed that the assessee had only purchased software, which was copyrighted article and there was no transfer of copyright, and therefore, in such cases, the same would not be treated as "royalty" under the respective tax treaty.
- ITAT noted that the end user could only use the computer programme by installing it in the computer hardware and would not be able to reproduce the same for sale or transfer.
- ITAT also observed that the licence granted imposed restrictions or conditions for the use of the computer software.

- Relying on SC ruling in Engineering Analysis Centre of Excellence Private Limited, ITAT stated that as per Article 12 of the DTAA, the distribution agreements/ End-User License Agreements would not create any interest or right in such distributors/end users, which would amount to the use of or right to use any copyright.
- ITAT held that the consideration paid to non-resident software manufactures / suppliers would not give rise to income taxable in India and, therefore was not liable for deduction of tax at source u/s 195 of the Act.
- Accordingly, ITAT ruled in favour of the assessee.

M/s. Sundaram Business Services Limited vs. Income Tax Officer, Corporate Ward 6(3), Chennai [TS-193-ITAT-2021(CHNY)] dated 19th March, 2021

Facts:

- The assessee, a company, was engaged in the business of providing IT enabled services, outsourcing services.
- The assessee paid professional charges to two offshore entities, a Chartered Accountant company and a law firm, for rendering professional services without deduction of tax at source on the grounds that professional charges paid to offshore entities did not come under the provisions of section 195 of the Income Tax Act, 1961.
- During the assessment proceedings, AO disallowed said expenses as AO opined that TDS was required to be deducted even though the payments were made to the offshore entities.
- Aggrieved, the assessee filed an appeal before ITAT.

Issue:

- Whether TDS was required to be withheld on payment made towards professional charges to offshore entities?

Held:

- ITAT stated that professional services rendered by an individual/ firm of individuals, being a resident of one of the Contracting States would be taxable only in that State unless individual or firm has a fixed base in India.
- ITAT noted that the professional services in relation to legal services were in the nature of independent professional services as defined under Article 14 of India-Australia DTAA and hence was outside the scope of definition of royalties as defined u/s.9(1)(vi) of the Act, and thus, outside the scope of provision of section 195 of the Act.
- ITAT, as regards to Chartered Accountancy Services, stated that even though the said payment was not covered under Article 14, it was covered under Article 7 of India-USA DTAA.
- ITAT observed that the Chartered Accountant company had no PE in India and also the services were rendered outside India.
- ITAT held that above service was, thus, outside the scope of provisions of section 195 of the Act, because it was neither in the nature of royalties as defined u/s.9(1)(vi) of the Act nor in the nature of fess for technical services because the nature of services rendered by the company of accountants did not make available technical knowledge, expertise, skill, know-how or processes to the assessee.
- Accordingly, ITAT ruled in favour of the assessee.