INTERNATIONAL TAXATION

CA. Hinesh Doshi, CA. Pramita Rathi

M/s. Lloyd's Register Asia (India Branch Office) vs. Dy. Commissioner of Income Tax, (International Taxation)-3(1)(2) Mumbai [TS-937-ITAT-2021(Mum)] dated 30th September, 2021

Facts:

- The assessee company, a tax resident of UK, was engaged in the business of undertaking survey of ships for inspection, classification and certification etc. and catering to the marine, energy, transportation and automotive industry for provision of survey and certification related services.
- The assessee paid management fees under Management Service Agreement entered with Lloyd's Register Shipping, U.K. (LRS)
- The assessee contented that management fee was not liable to tax in India.
- AO disallowed the management fees paid to LRS by invoking Section 40(a)(ia) of the Income Tax Act.
- Aggrieved, the assessee filed an appeal before ITAT.

Issue:

- Whether management fees would be liable to TDS u/s. 195 as fees for technical services (FTS) under India-UK DTAA?

Held:

- ITAT observed that the expression 'managerial services' was not included in the of FTS under Article 13(4) of India-UK DTAA and also observed that the various services covered by Management Services Agreement.
- ITAT noted the DRP's reasoning that management fee was taxable as FTS as it was ancillary and subsidiary to the enjoyment of the property for which the royalty payment was made.
- ITAT referred to the conditions mentioned in the MOU of India-USA DTAA, required to be fulfilled for ancillary services were identical to the rights under license agreement. However, none of the conditions were fulfilled in the instant case.
- Relying on SC ruling in 'Engineering Analysis', ITAT allowed deduction of management fee and held the position was accepted by CBDT in Unilateral Advance Pricing Agreement as payment was at Arm's Length.
- Accordingly, ITAT ruled in favour of the assessee.

M/s. Net App B.V. vs. Dy. CIT, Circle-2(2)(2), International Tax New Delhi [TS-939-ITAT-2021(Del)] dated 20th September, 2021

Facts:

- The assessee company, a tax resident of Netherlands, was engaged in the business of selling storage equipment and products and services in India through a third-party distributor appointed on a non-exclusive basis.
- AO observed that the business premises of the assessee in India constituted PE and held that the receipt from sale of embedded software was taxable in the nature of royalty and service levy charged by the assessee was taxable as Fees for Technical Services (FTS) under India – Netherlands DTAA.
- Aggrieved, the assessee filed an appeal before ITAT.

Issue:

- Whether business income from sale of equipment was taxable in India?

Held:

- ITAT relied on the earlier order of the assessee's case for previous years' where it was held that the assessee does not have PE in India as per Article 5 of India-Netherlands DTAA.
- ITAT observed that business income arising on sale of equipment was not taxable in India in absence of PE as per Article 7 of India-Netherlands DTAA.

- ITAT held in the earlier years that services performed by the assessee was not taxable in India in absence of satisfaction of make available clause.
- ITAT further held that due to uniformity in the nature of services and as the facts remained the same, it was not taxable as FTS in the present year.
- ITAT held that the taxability of software royalty was decided in SC ruling of 'Engineering Analysis' and directed AO to adjudicate the issue after giving due and proper opportunity to the assessee to present its case.
- Accordingly, ITAT ruled in favour of the assessee.

M/s. Integrated Container Feeder Service vs. Joint Director of Income-tax (Intl. tax)- 4, Mumbai [TS-907-ITAT-2021(Mum)] dated 23rd September, 2021

Facts:

- The assessee is a shipping company incorporated in and tax resident of Mauritius, computed its income from freight as taxable in India and claimed relief under India – Mauritius DTAA.
- AO observed that assessee had agency PE in India in the form of shipping agents providing services in lieu of commission and held the business profits taxable under Article 7 of India-Mauritius DTAA.
- Aggrieved, the assessee filed an appeal before ITAT.

Issue:

- Whether independent shipping companies constitute agency PE in India?
- Whether business profits were taxable under Article 7 of DTAA in absence of PE in India?

Held:

- ITAT held that entities that alleged to be agency PE were providing similar services to other shipping companies and do not work exclusively for the assessee.
- Relying on the case of Overseas Transport Co. Ltd. and Bay Lines, ITAT held that the shipping agents in India do not constitute agency PE and in absence of PE in India, business profits were not taxable in India.
- Accordingly, ITAT ruled in favour of the assessee.

M/s. BMC Software Asia Pacific Pte Ltd. vs. ACIT (International Tax), Circle-1, Pune [TS-861-ITAT-2021(PUN)] dated 8th September, 2021

Facts:

- The assessee company, incorporated in Singapore, earned income from sale of software license and rendering support, maintenance and training services.
- AO considered the payment received by the assessee for supply of software and rendition of software related services as Royalty under IT Act and DTAA.
- Aggrieved, the assessee filed an appeal before ITAT.

Issue:

- Whether the receipts from sale of software were taxable as Royalty?

Held:

- Relying on SC ruling in 'Engineering Analysis', ITAT held the ruling was applicable in the instant case.
- ITAT further held that the assessee must have a PE in India inorder to tax the business profits under Article 7 of DTAA.
- ITAT remarked that the receipt is in connection with rendering of software related services and not for parting with the copyright of the software and therefore it was not taxable as Royalty under Article 12 of the DTAA.
- Accordingly, ITAT ruled in favour of the assessee.