INTERNATIONAL TAXATION

CA. Hinesh Doshi, CA. Pramita Rathi

Airports Authority of India vs. Income Tax Officer (TDS), Ward-1(1), New Delhi [TS-345-ITAT-2021(DEL)] dated 4th May, 2021

Facts:

The assessee, Airport Authority of India (AAI) entered into an agreement with Federal Aviation Administration, USA (FAA), for providing technical assistance to AAI as well as an agreement was entered into between the Ministry of Civil Aviation and FAA administrator for transactions on reimbursement basis.

AO treated the consideration paid to FAA as fees for technical services (FTS), chargeable to tax as per Section 115A of the Income Tax Act, 1961 on the contention that FAA did not enjoy sovereign immunity from being taxed in India and satisfied the 'make available' clause under Art. 12(4)(b) of the India-US DTAA.

Furthermore, CIT (A) held that the entire sum paid to FAA was taxable as FTS under the DTAA and liable to TDS u/s 195.

Aggrieved, the assessee appealed before ITAT.

Issue:

Whether the consideration paid to FAA was taxable in India?

Whether TDS was applicable on the consideration paid?

Held:

ITAT observed that the technical assistance provided by FAA were neither a licensed product nor exclusive patent of FAA, and that the technology was not made available to the assessee for perpetual use but it was a case of assistance and technical cooperation between the assessee and FAA with no commercial interest of FAA.

Relying on HC ruling of DIT vs Guy Carpenter & Co. Ltd, ITAT held that 'make available' clause was not applicable based on the manner of transacting, agreements, services provided, reimbursement received.

- ITAT noted that reimbursement would not be liable to TDS as it was purely on cost to cost basis i.e. it did not involve any profit element.
- Further, relying on the case of Dunlop Rubber Company and Industrial Engineering Projects, ITAT held that reimbursement would not be regarded as revenue receipt and reimbursement of actual expenditure would not be taxed in India.
- Accordingly, assessee ruled in favour of assessee.

Lubrizol Advanced Materials Inc. vs. A.C.I.T(International Taxation), Vadodara [TS-433-ITAT-2021(Ahd)] dated 31st May 2021

Facts:

- The assessee, a US based company, had an AE in India which was engaged in establishing a new manufacturing unit in India.
- AE entered into an inter-company service agreement with the assessee for engineering, technology, and project supervisory services chargeable at cost plus 10% for which the assessee sent its personnel to India.
- AO noted that there were two employees of the assessee, involved with the supervisory services and director services, whose salary, which was partly reimbursed by assessee, were not considered as income from supervisory PE in the return filed.
- During the course of assessment, AO passed an order under section 143(3) read with section 144C of the Income Tax Act, 1961 and added the salary of the above individuals to income from supervisory PE of the assessee.
- Aggrieved, the assessee appealed before ITAT.

Issue:

- Whether the salary paid to the personnel sent by the assessee was liable to be taxed as income from supervisory PE?

Held:

- ITAT observed that the AE at the time of paying salary had complied with TDS requirements and also filed the individuals return of income in India.
- ITAT, on perusal of the agreement, noted that the individuals were decided to be the managing directors of the AE and were to work under its supervision and guidance.
- ITAT, on the issue of dependent agent raised by assessee, noted that entire sale transaction took place outside India as an offshore sale, and that the individuals worked as directors and as signatories of the AE, and they did not provide any service with respect to sale of goods, which was sold at arm's length price.
- ITAT held that the individuals were employees of the AE and signed the purchase agreement as authorised signatory of the AE, thus, it was concluded that there was no connection with the assessee to constitute Agency PE.
- Accordingly, ITAT ruled in favour of assessee.

Morgan Stanley Mauritius Co. Ltd vs. Deputy Commissioner of Income Tax International Taxation Circle 3(2)(2), Mumbai [TS-400-ITAT-2021(Mum)] dated 28th May, 2021

Facts:

- The assessee, a tax resident of Mauritius, was engaged in investing in the India Depository Receipts (IDRs) issued by an Indian branch of a bank, with the underlying assets as shares in a UK based company held by the depository's custodian, a Bank in USA.
- The UK Based company was listed in London Stock Exchange, and the IDRs so issued were listed in India.
- The assessee received certain dividends for the underlying shares relatable to the IDRs in which it had made investment through the Indian bank.
- During the assessment proceedings, AO questioned the assessee as to why the dividend income was not taxed in India and issued a show case notice for the same.
- AO was not impressed by the submission of the assessee and proceeded to tax these dividends under section 115(1)(a) @ 20% plus applicable surcharge and cess.
- Aggrieved by the AO's contention and ruling by DRP, assessee filed an appeal before ITAT.

Issue:

- Whether the dividend income in respect of shares in IDRs were chargeable to tax in India?

Held:

- ITAT observed that the dividend physically flowed from UK company to US bank but the US Bank was only a custodian and the actual recipient was the Indian bank, because the shares were held by the Indian bank though a custodian.
- ITAT also observed that IDR holders were not the shareholders and they were only entitled to the benefits of the shareholding net of fees, taxes, duties, cost and expenses and not dividend income.
- ITAT noted that the payments did not meet the requirements of the definition of dividends under Article 10 of the Indo Mauritius DTAA as the dividend were paid by UK company and not by an Indian company to the Mauritian tax resident which was a pre-condition for the applicability of Article 10.
- ITAT stated that such income was treaty-protected and would not be taxed in the hands of the assessee in India under Article 22 of the DTAA.
- ITAT observed that the ownership of shares was with Indian bank and US bank only had the custody.
- The IDRs were issued in India by Indian Bank and were listed in Indian Stock Exchanges with entire management and operations of the depository admittedly in India.
- ITAT stated that as sec 9(1)(iv) of the Income Tax Act, 1961 does not contain a non-obstante provision, the dividend would be taxable in India u/s 9(1)(i) of the Act.
- ITAT Mumbai held that income from IDRs in the hands of Mauritian investor was taxable in India u/s 9(1)(i) but extends exemption under Article 22 of India-Mauritius DTAA.
- Accordingly, ITAT ruled in favour of assessee.

SQS India BFSI Ltd. vs. The Deputy Commissioner of Income Tax [TS-442-ITAT-2021(CHNY)] dated 3rd May 2021

Facts:

- The assessee, an India-based software service provider, was engaged in primarily delivering software validation and verification services to the banking and financial services industry worldwide.
- The assessee entered into an agreement with foreign commission agent, domiciled in UAE and Bahrain, with no PE in India, for sourcing orders on commission basis.
- AO observed that the services rendered by the agents also included rendering of specialized technical services and held that the expenditure incurred by the assessee was fees for technical services (FTS) and disallowed the export commission paid u/s 40(a)(ia) of the Income Tax Act, 1961.
- Aggrieved, the assessee filed an appeal before ITAT.

Issue:

- Whether the commission paid by the assessee was taxable in India?

Held:

- Relying on the SC ruling in Toshuko Ltd and and GE India Technology, ITAT held that TDS was not deductible from commission payment to a foreign agency where a non-resident had no PE in India.
- ITAT observed that agreements with foreign agents did not provide for any technical services and that there was no income chargeable to tax in terms of section 195(1).
- ITAT noted that lower authorities had not given any findings of taxability in absence of any PE in India as per section 9(1)(i) of the Income Tax Act,1961 and Article 7 r.w. Article 5 of the concerned DTAA.
- ITAT stated that there could be no liability either under the domestic law or under Double Taxation Avoidance Agreement as both the non-residents had no PE in India.
- Accordingly, ITAT partly ruled in favour of assessee.