M/s. Barclays Technology Centre India Pvt. Ltd. vs. DCIT, Circle-1(1), Pune [TS-30-ITAT-2021(PUN)] dated 12th January, 2021

Facts:

- The assessee, an Indian company, was engaged in software development and production of software products.
- During assessment proceedings, AO observed that the assessee claimed deduction on leased line charges paid to various vendors in India, however, the assessee did not deduct tax at source as per Income Tax Act, 1961 ("Act").
- The assessee contended that such payment was not in the nature of fees for professional or technical services or royalty, etc. and therefore TDS deduction was not liable.
- AO was not satisfied with the assessee's contention and invoked disallowance under section 40(a)(ia) of the Act.
- Aggrieved, the assessee filed an appeal before ITAT.

Issue:

- Whether the assessee was liable to deduct tax on payments made towards lease line charges?

Held:

- ITAT observed that leased line charges fall within the definition of "Royalty" by the latest Finance Act 2012 w.r.e.f. 01-06-1976, which covered the assessment year under consideration.
- ITAT stated that if no liability existed at the time of making payment, any subsequent retrospective amendment could not be enforced against the payer.
- ITAT held that as leased line charges got under the ambit of 'Royalty' u/s. 9(1)(vi)

of the Act after the relevant financial year was closed, it could not trigger deduction of tax at source so as to warrant any disallowance u/s.40(a)(ia) of the Act.

- Accordingly, ITAT ruled in favour of assessee.

Additional Director of Income Tax, International Taxation 1(1), Mumbai vs. Asia Today Limited [TS-40-ITAT-2021(Mum)] dated 29th January, 2021

Facts:

- The assessee, a Mauritius based company, was engaged in selling advertising time and collecting subscription revenues through its Indian affiliates.
- The assessee claimed that it had no permanent establishment ("PE") in India and therefore, no part of its income was taxable in India.
- However, AO argued that its Indian agent constituted as dependant agent permanent establishment ("DAPE") and therefore, the assessee had a PE in India under article 5(4) of India-Mauritius DTAA.
- The assessee pleaded that in case it had a PE, no further profits could be attributed in its hands as the agent was paid arm's length remuneration for services rendered. However, this plea was rejected by AO.
- On ruling in favour of assessee in CIT, Revenue filed an appeal before ITAT.

Issue:

- Whether assessee had a permanent establishment in India and would it be taxable in India?

Held:

- ITAT observed the assessee had no office or place of management of its own, and its presence in India was only through its agents.

- ITAT noted that the case of AO thus hinges on the applicability of Article 5(4) of the treaty.
- ITAT held that the existence of DAPE was of no tax consequence as long as an agent was paid arm's length remuneration for the services rendered and nothing survived for taxation in the hands of the DAPE.
- ITAT stated that no additional profits were to be brought to tax as a result of the existence of the DAPE, and, therefore, the question about the existence of a DAPE on the facts of this case was wholly academic.
- In view of the above, ITAT observed that the existence of a DAPE was wholly tax neutral.
- Accordingly, ITAT ruled in favour of assessee.

International Air Transport Association (CANADA vs. The Asst. Commissioner of Income Tax (I.T.)-2(2)(1) [TS-42-ITAT-2021 (Mum)] dated 08th January, 2021

Facts:

- The assessee, a company incorporated in Canada, was an NGO and had a branch office in India.
- During scrutiny assessment, AO observed that the assessee had not offered certain income for tax.
- The assessee argued that the income, except some, were not in the nature of royalty, FTS or business profits and were thus, not eligible for tax in India. AO, not being persuaded, added the streams of income to the returned income of the assessee.
- Moreover, AO also stated that the assessee had permanent establishment ("PE") in India and accordingly 40% of the revenue earned from sale of the distance learning courses through Authorized Training Centres ("ATC") be attributed to tax in India as per Article 7 of the India-Canada tax treaty.
- Aggrieved, assessee filed an appeal before ITAT.

Issue:

- Whether the stated streams of income earned by the assessee was liable to be taxed in India?
- Whether the assessee had a PE in India and would the income earned from it be taxable in India?

Held:

- ITAT noted that the ATC's were independent third-party organisations that provided training of their various self-designed courses, courses designed by other third parties and also the courses designed by the assessee.
- ITAT noted the activities of the ATC's were independent and the transactions between the assessee and the ATC's were made under arm's length conditions.
- ITAT concluded that the ATC's were agents of independent status of the assessee within the meaning of Article 5(5) of the India-Canada tax treaty.
- ITAT also noted that as the consideration received by the assessee was towards a simplicitor sale of training material/books, it cannot be treated as 'royalty' under Article 12(3) of the India-Canada tax treaty.
- ITAT stated that the amount received by the assessee as application fees for DGR manuals/publications could not be treated as 'royalty' as the sales did not involve transfer of intellectual property and did not contain any un-divulged technical information not available in public domain.
- ITAT observed that the BSP Link charges were collected by the assessee for onward remittance to Spanish company without any mark-up and therefore did not constitute as 'business income'.
- ITAT also observed that IATA Clearing House Facility (ICH) service was rendered outside India, with the fees received outside India and therefore the income would not be attributed to Indian branch as no services were performed by Indian branch in compliance with RBI mandate providing permission for rendering only BSP services.
- Accordingly, ITAT ruled in favour of assessee for the above views.