Director of Income Tax-II (International Taxation), New Delhi vs. Samsung Heavy Industries Co. Ltd. vs. [TS-352-SC-2020] dated 22nd July, 2020

Facts:

- The assessee operated through Project Office (PO) in Mumbai, India and it entered into a turnkey contract with ONGC.
- AO and ITAT held that the PO constitutes fixed place PE in India.
- HC held that there was no finding made by AO and ITAT that 25% of gross revenue of the assessee outside India was attributable to the business of the PO of the assessee and thus ruled in favour of assessee.
- Aggrieved, the Revenue appealed further to Supreme Court.

Issue:

- Whether the PO in Mumbai of the assessee would constitute as a fixed place PE?

Held:

- SC relied on various similar caselaws like Morgan Stanley & Co. Inc, Hyundai Heavy Industries Co. Ltd, Ishikawajma-Harima Heavy Industries Ltd, E-fund IT Solutions Inc.
- SC cleared that the condition precedent for applicability of Article 5(1) of DTAA and the ascertainment of PE was that it should be an establishment "through which the business of an enterprise" is wholly or partly carried on.
- The Honourable Apex Court elucidates that the profits of the foreign enterprise were taxable only where the said enterprise carries on its 'core business' through its PE.
- SC observed that the PO was established to co-ordinate and execute "delivery documents in connection with construction of offshore platform modification of existing facilities for ONGC.
- SC further observed that only two persons were working in the PO, none out of which had any qualification to perform any core activities.
- SC accepted that the PO falls within clause (e) of Article 5(4) of DTAA in as much as PO was solely an auxiliary office and was meant to act as a liaison office between the assessee and ONGC.
- Accordingly, SC held in favour of the assessee and did not constitute PE in India as per Article 5(1) of India-Korea DTAA.

IMG AG vs. Dy. Commissioner of Income Tax, International Tax [TS-342-ITAT-2020(Mum)] dated 13th July, 2020

Facts:

- The assessee, incorporated in Switzerland was engaged in providing marketing research report on pharmaceutical sector to its customers.
- The assessee received consideration for granting access to database on information collected and processed, mainly in the field of medicine and pharmaceuticals.
- AO held that these receipts for grant of license access which was a non-exclusive and non-transferable access to the database were taxable as royalty u/s 9(1)(vi) as also under Article 12(3) of the Indo Swiss DTAA.
- Aggrieved, the assessee appealed before Mumbai ITAT.

Issue:

- Whether the consideration towards database access is taxed as royalty under the India-Swiss DTAA?

Held:

- Relying on AAR Ruling of Dun and Bradstreet Information Services India Pvt Ltd., ITAT opined that the consideration received by the assessee for granting access to database cannot be termed as Royalty under Article 12(3) of the Indo-Swiss DTAA.
- ITAT noted that HC approved the ratio of AAR and opined that Article 12(3) of Indo Swiss DTAA was verbatim the same as Article 13(3) of India Spain DTAA.
- ITAT held that that the conclusions arrived at by the AAR and furthermore approved by HC are equally applicable in the context of Indo Swiss DTAA.
- ITAT stated that the view expressed by HC cannot be open for a contrary view, especially when no contrary decision was brought to the notice of ITAT.
- Accordingly, ITAT ruled in favour of the assessee and concluded that consideration received towards database access is not royalty under India-Swiss DTAA.

Edenred Pte Ltd vs. The Deputy Director of Income Tax (International Taxation), Mumbai [TS-361-ITAT-2020(Mum)] dated 20th July, 2020

Facts:

- The assessee company, a tax resident of Singapore, was engaged in providing its Indian group companies with infrastructure and hosting data entre charges (IDC charges), management consultation services and referral services for regional customers.
- The assessee claimed non-taxability of revenues from the services to the Indian companies by claiming benefit of Article 12 of India-Singapore DTAA.
- AO disagreed the assessee's claim and passed a final assessment order in which the IDC charges were taxed as royalty whereas the management fees and the referral charges were taxed as FTS.
- Aggrieved, the assessee filed an appeal before Mumbai ITAT.

Issue:

- Whether the services provided by the assessee to the Indian companies would taxed as Royalty and FTS under India-Singapore DTAA?

Held:

- ITAT noted that the assessee received payments for the standard IDC software and did not use of any software.
- ITAT relied on the AAR ruling in Bharati Axa General Insurance Co. Ltd and various caselaws like ExxonMobil Company India (P.) Ltd, Standard Chartered Bank and Reliance Jio Infocomm Ltd etc. and held that the management fee was not taxable as FTS under Article 12(4) of DTAA as make available condition was absent.
- ITAT noted that the said services were provided only to support to carry on business efficiently and run the business in line with the business model, policies and best practices followed by the assessee company.
- ITAT observed that the revenues from referral fees were not taxable as FTS as the "make available" condition was not satisfied.

- Accordingly, ITAT ruled in favour of the assessee.

Damco International A/S vs. Deputy Commissioner of Income Tax (International taxation) [TS-357-ITAT-2020(Mum)] dated 20th July, 2020

Facts:

- The assessee company, incorporated in Denmark, was engaged in the business of shipping and logistics.
- The assessee incurred certain costs towards procurement of insurance, accounting software, travel, fixed assets (computer servers) etc. at group level which were subsequently recovered from various group entities.
- The assessee claimed the reimbursement of cost received towards business support charges as non-liable to tax on the grounds of absence of PE in India.
- AO treated the amount received as technical services and taxed as FTS and royalty as per the IT Act and under Article 13 of the India-Denmark DTAA.
- Aggrieved, the assessee filed an appeal before Mumbai ITAT.

Issue:

- Whether the reimbursement of cost received towards business support charges by the assessee would be taxed as FTS and royalty under DTAA?

Held:

- ITAT observed that the services rendered were in nature of co-ordinating services whereby various costs incurred were pooled together and charged/recovered as reimbursement of costs on the basis of various allocation keys.
- ITAT stated that that the amount received towards business support services related to procurement and issuance are reimbursement of cost incurred for the benefit of the group companies and not technical, managerial or consultancy in nature.
- ITAT stated that the reimbursement was in the nature of low end BPO and hence it did not come under the purview of managerial, technical and consultancy.
- Relying on the case of A.P. Moller Maersk, ITAT stated that all the receipts in relation to business support charges in the nature of reimbursement of cost were devoid of any income element of profit embedded into it and therefore it ought not be taxed as FTS.
- ITAT held that the receipt of business support charge was not taxable as FTS under the IT Act or the relevant DTAA as the same was purely in the nature of reimbursement of cost.
- Accordingly, ITAT ruled in favour of the assessee.