

SATURDAY INTERNATIONAL TAX GYAN !!!**Regen Powertech (P.) Ltd. v. DCIT, (International Taxation)-2(1)**

Payment to Non-residents for Technical services provided outside India was liable to TDS in India

**Facts:**

- The assessee was engaged in the business of manufacture and supply of windmill.
- During the year under consideration, the assessee had exported Wind Turbine Generator (WTG) to Sri-Lanka.
- The assessee engaged the services of following service providers
 - WFPL, Sri-Lanka for the purpose of erection and commissioning of WTGs at customer's premises.
 - WRS, Germany for carrying out the repair on the rotor blades by deploying its service technicians.
 - E&Y, UAE in connection with a market study for wind energy.

Assessee's contention:

- The assessee contended that when fees are paid in respect of services employed in a business or profession carried on by such a person **outside India then the said provision would not apply** because of an exception provided in Section 9(1)(vii)(b).
- Further, M/s. WFPL, Sri-Lanka and M/s. WRS, Germany, **are providing business services and not technical services**. Therefore, as the said companies do not have a PE in India, so these incomes are not taxable in India keeping in line with Article 7 of the DTAA with Sri-Lanka and Germany respectively read with Section 90 of the Act.

Revenue's contention:

- The scope of work mentioned therein and the various clauses contained in the work order and held that the work being carried out in Sri-Lanka is not mere construction, assembly or mining like project, installation of a wind turbine requires a lot of technicalities. M/s. WFPL **is required to provide skilled technical assistants and site engineers for executing the installation work**. Thus, it was contended that the services of technical personnel are used in the Installation of Wind turbines and hence, the services rendered by M/s. WFPL to the assessee for his projects in Sri-Lanka are in the nature of Fee for Technical Services.
- Similarly, payment made to M/s WRS in Germany for repairs and to E&Y, UAE in connection with market study also need skilled workers and hence the same needs to be covered in the nature of Fees for Technical Services.

Ruling:

- The terms and conditions of the contract entered into between the assessee and the three foreign entities were minutely studied and were found to be in the nature of Technical services and not simple business services.
- The decision in the case of Evolv Clothing Co. (P.) Ltd. [2018] 94 taxmann.com 449 was distinguished on facts as the same relates to export commission and agency service which does not require technical or managerial knowledge.
- Court relied on the judgement in case of Havells India Ltd. [2012] 21 Taxmann.com 476 wherein it was stated **distinction needs to be made between the source of the income and the source of the receipt of the monies**. In order to fall within the second exception provided in Section 9(1)(vii)(b) of the Act, **the source of the income**, and not the receipt, should be situated outside India.
- For getting benefit under this exception, it is not sufficient for the assessee to prove that the technical services were **not utilized** for its business activities of production in India, but **it is further necessary for the assessee to show that the technical services were utilized in a business carried on outside India**.



Our comments:

- The court has very minutely studied the contract and the conduct of parties. It has carefully categorized the transaction as technical services and not plain vanilla business services.
- It is pertinent to note that **even if the work is getting done in Sri-Lanka** and not in India, it has not been considered to be covered by the terms “utilized in a business or profession carried outside India” or “earning any income from any source outside India”.
- Of late it has seen that even if the transaction seems to accrue and arise outside India, the judiciary has considered it to be sourced in and taxed in India due to enlargement of deeming Fiction. On similar lines read our take on Volkswagen Finance Private Limited - <https://rb.gy/vq0qho>.
- Thus, from the above judgement, it can be seen that exception to section 9(1)(vii)(b) may only be available only if payment is made by Indian resident to non-resident for **its business situated outside India (maybe an entity/branch)**. In all other cases, services will be deemed to be received in India and therefore TDS needs to be deducted on any payment for “Fees for Technical services”.

Section	195, 9(1)(vii), Article 12 of DTAA
DTAA/Country	Sri Lanka, UAE, Germany
Court	Madras
Date of decision	04.07.2019

Note: Case law name in **Red**- in favour of the Revenue, **Green**- In favour of the Assessee, **Orange** = Partial.

Disclaimer: This document has been prepared on the basis of information available in the public domain and is intended for guidance purposes only. We have taken reasonable care to ensure that the information in this document is accurate. It, however, accepts no legal responsibility for any consequential incidents that may arise from errors or omissions contained in this document.

Stay Healthy! Stay Safe!

Thank you

