SATURDAY INTERNATIONAL TAX GYAN !!!
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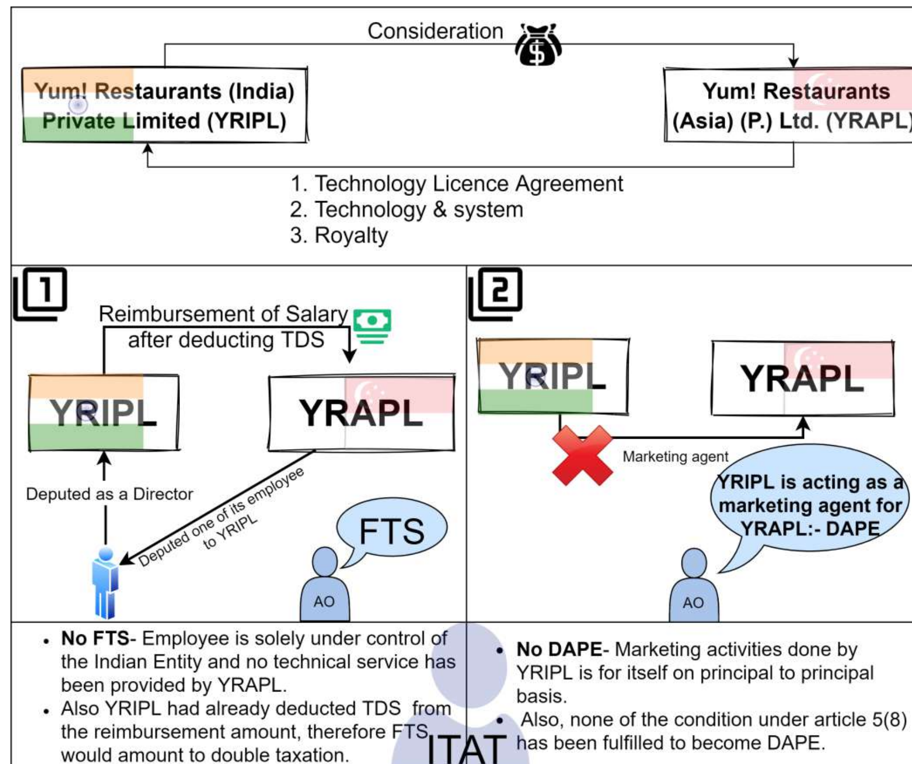
Deputy Director of Income-tax v. Yum! Restaurants (Asia) (P.) Ltd.[1]

To establish PE of a foreign entity there needs to be a proof that Indian activities are controlled by foreign entity.



Facts:

- The assessee is a Singapore based company engaged in the business of franchising restaurant outlets; it entered into a **Technology Licence agreement (TLA)** with an Indian company (YRIPL) for operating restaurants in India under various franchises. As per TLA, assessee was to receive royalty from the Indian entity.

- The assessee had also deputed one of its employee as a director who was working for Indian entity, he would also sign the financials and was under full control and lien of Indian entity.

- Further the salary, bonus etc would be first paid by the assessee and then the same would be reimbursed by Indian entity to the assessee on a cost to cost basis. However,

[1][2020] 117 taxmann.com 759 (Delhi - Trib.)

all other expenses such as boarding, lodging, food, beverage and travel etc would be borne by Indian entity.

Assessee's contention:

- Assessee was of the view that such a person was shifted to India and was solely working for Indian entity whose salary was reimbursed on cost to cost basis to the assessee after deducting TDS and paying other fringe benefit taxes as applicable.
- Therefore if the amount is considered as FTS and brought to tax, **same would result into double taxation** as the employee had already paid the tax on its salary.

Revenue's contention:

- The AO was of the view that the person employed by the assessee, working under the Indian entity, were seconded to India; the salary of the said person was reimbursed by the Indian entity and hence salary reimbursed has to be **treated a FTS under Article 12** of the India-Singapore DTAA.
- AO also noted that there was the existence of service PE/ DAPE in India and had sought for attribution of business income to the PE as the income of assessee was dependent on sale in India, the Indian entity had even undertaken advertising expense for same and for which assessee had deployed it's employee.

Ruling:

- On going through the deputation agreement it was observed that the said employee was under direct control of the Indian entity he not only attended the Board Meeting but also signed the financial statements of the Indian entity in his capacity as Director which clearly specifies that he is working solely under Indian entity.
- Also, Indian entity had already deducted TDS on the salary and applicable fringe benefit taxes therefore taxability under FTS would amount to double taxation.
- **No Service PE/ FTS:-** ITAT held that, firstly FTS and service PE cannot co-exist. Also, as per Article 12 of the DTAA, the 'make available' clause needs to be fulfilled to hold the existence of PE for technical services. In absence of the same, it was not possible to hold that there was taxability as FTS.
- Further, if reimbursement of salary is considered as FTS for assessee and PE income then in that case assessee would reduce the salary paid to employee and hence no income would be taxable in India.

- **No DAPE:-** The marketing activities undertaken by Indian entity were for itself and its franchisee and not for assessee and AO was unable to prove fulfilment of any conditions under article 5(8) of the DTAA that results DAPE of the assessee in India, therefore it can't be said that assessee had a DAPE in India.

- Centrica India Offshore Pvt. Ltd (Delhi HC), cannot be said to apply as in that case the overseas company provided services to the Indian Company through seconded employees.

Our comments:

- Contract and Conduct of Employee(s) is absolutely important to ascertain for whose behold they are working. Only if they are working on behalf of Foreign Company, there could be a question of Technical Services/ PE. Otherwise they would be considered as employees of ICO.

- To establish agency PE, the agent should enter into contract with other entities on behalf of the principal. However if the person is entering into agreement on a principal to principal basis and just because foreign entities depend on Indian entity sale it will not result in agency PE.

Section	**Article 12, 5**
DTAA/Country	**Singapore**
Court	**ITAT Delhi**
Date of decision	**06.07.2020**

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

Refer our previous case laws editions at our website jainshrimal.com/topic/saturday-international-tax-gyan/

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