

## SATURDAY INTERNATIONAL TAX GYAN !!!

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Paramina Earth Technologies Inc v. Deputy Commissioner of Income-tax (International Taxation), Visakhapatnam <sup>1</sup>

**In absence of separate article of FTS in DTAA, such income shall be considered as business income and in absence of PE in India non resident is not required to pay tax in India.**

### Facts:

- M/s Paramina Earth Technologies Inc. (PET) is a foreign company having expertise in the mining activity. It was engaged by M/s Teknomin Construction Ltd., Vijayawada (M/s TCL) to recruit skilled and experienced employees for mining at the mines of Hindustan Zinc Ltd., situated at Rajasthan. The assessee company was represented by M/s Teknomin Constructions Ltd., Vijayawada.
- The assessee filed the return of income for the A.Y. 2013-14 and 2014-15 admitting 'Nil' income whereas it had received retainer fee from Teknomin Constructions Ltd., Vijayawada for an amount of Rs. 8,55,638/- for the A.Y.2013-14 and Rs. 64,76,103/- for the A.Y.2014-15. The assessee further explained that for the services rendered by PET in identifying persons with requisite skill and experience, they were remunerated by TCL at the rate of 10% of the salary of certain specified employees. The same was billed by PET monthly as retainer fee and it was remitted to the assessee monthly by TCL. The salaries of individual employees were paid partly in India and partly through PET in Philippines to the designated bank account of the employee on monthly basis.

### Assessee's contention:

- Assessee claimed the deduction of the entire receipt stating that in the absence of PE in India as per the Indo Philippines DTAA and in the absence of FTS article in the Indo Philippines DTAA, the same is not taxable in India and arrived at Nil income.
- The Ld.AR submitted that PET does not have any office in India. All the services with respect to identifying the persons suitable for employment by TCL are performed in Philippines.

### Revenue's contention:

- AO observed that the assessee initially deducted the tax u/s 195 after grossing up of tax @21.115% on remittances made to PET by TCL and later on revised TDS return and thus AO viewed that payments made to TCL by PET are to be treated as Fee for Technical Services and taxable u/s 9(1)(vii) of the Act in the hands of the PET.
- The Ld. CIT(A) relied on section 9(1) (vii) and Circular No. 333 dated 2-4-1982 and held that the retainer fee paid by the assessee to PET is taxable as fee for technical services and stated that assessee had PE in India in form of mining activities.

<sup>1</sup> [2020] 116 taxmann.com 347 (Visakhapatnam - Trib.)

## Ruling:

- There is no dispute that the payment made was in the nature of fee for technical services. There exists DTAA with the Philippines Government dated 25-3-1996 and as per the DTAA, fee for technical services was not covered in Articles 6 to 22 which deals with taxing various sources of income, therefore, the same required to be taxed either as business profits or under Article 23. Article 23 deals with incomes not arising or not dealt within the articles of the treaty which shall be taxed in the contracting state of recipient. Therefore, fee for technical services which is not covered under the treaty of DTAA required to be taxed as business profit under Article 7 of DTAA.
- For the purpose of taxing the business profits, there must be permanent establishment in the contracting state. The Ld.CIT(A) in his order taken support of clause 'c' of section 9(1)(vii), which is relevant for the payments made by the non resident, but not the resident. In the instant case, the payment was made by the resident to non resident, therefore, the Ld.CIT(A) misunderstood the provisions of section 9(1)(vii)(c).
- Therefore, the payment made to the non resident required to be taxed under article 7 under the head 'business profits'. There is no PE in India to non resident. The AO has not made out a case of having PE to non resident in India. Therefore, the payment made to non resident are not to be taxed in India as business profits.

## Our comments:

- As seen in the judgement above in absence of Article of Fees for technical service or fees for included service such income will be taxed under Article 7 of DTAA i.e. business profit and in absence of PE in India no tax needs to be paid in India.
- Various countries which do not have separate article for FTS are as under:
  - Bangladesh
  - Brazil
  - Myanmar
  - Mozambique
  - Nepal
  - Philippines
  - Saudi Arabia
  - Syrian Arab Republic
  - Tajikistan
  - Tanzania
  - Thailand
  - United Arab Emirates

<b>Section</b>	<b>Section 9, Article 12 and 7</b>
<b>DTAA/Country</b>	<b>India- Philippines</b>
<b>Court</b>	<b>Visakhapatnam Tribunal</b>
<b>Date of Decision</b>	<b>26.02.2020</b>

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

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