SATURDAY INTERNATIONAL TAX GYAN !!!

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Infosys v. Deputy Commissioner of Income-tax, Circle 1(1)

Export of service outside India by a resident in India will not itself qualify as business outside India or source of income outside India

Date: 23.04.2022

Fact of the Case

- Appellant is an Indian company which is engaged in the business of development & export of Computer software and related services.
- The assessee has provided services to an overseas client and the same is sub-contracted to its subsidiary - Infosys China
- The payment was made by Infosys India to Infosys China without any deduction of tax at source.

Assessee's Contention

- Assessee contends that services rendered by Infosys (China) is covered under the exception (as below) mentioned in the section 9(1)(vii)(b) of Income Tax Act, 1961.
- " a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India **or for the purposes of making or earning any income from any source outside India** "
- Assessee was of the opinion that as the ultimate earning has its source outside India, the services provided by Infosys China is covered by the above exception and so does not fall in the definition of FTS under the Act. Therefore it is not liable to deduct TDS on the said payment.

Revenue's Contention

- Assessing Officer submitted that assessee has contracted to render services to the customers outside India and the payment being made from India, source rule of income being followed by India, the income accrues or arises in India and hence taxable in India.
- Hence, A.O. contend that the payment made by assessee to Infosys China is both liable as FTS and royalty under the domestic law as well as under the relevant DTAA.

RULING

- The A.O contended that services are being utilized in India, therefore the provision of section 9(1)(vi) and 9(1)(vii) is applicable in view of the retrospective amendment to Section 9(1)(vii) of act read with explanation.

- Noting that the retrospective amendment inserted by the 2010 Finance Act is free from any ambiguity, the Tribunal held that the law in India is that fees for technical services or royalty paid to a non-resident are taxable when those services are utilized in India, regardless of where they are rendered.

- As far as the utilization is concerned as a final product after utilization of partial services rendered by Infosys China being exported by the assessee the test of utilization is satisfied.

- The assessee had submitted that it has procured the contracts from overseas clients and the same is subcontracted to Infosys China. Merely, because the Clients are outside India does not mean that the assessee is carrying on business outside india.

- Hence, the source of income is within India, so the assessee do not fall under the exception of Section 9(1)(vii)(b) of Income tax act.

RULING

- It is the case of the applicant that its business principally comprises of export revenue that it provides data processing and IT support services to its group companies abroad and receive payment in foreign exchange against such export although its business is carried out from India the income it gets is from a source outside India and payment made for the purpose of earning income from a source outside India hence according to applicant benefit of exception 9(1)(vii)(b) will be available to him.

- The income which the applicant earns by data processing and other software export activities cannot be set to be from a source outside India, the source of such income is very much within India and the entire business activities and operations take place within India.

- Hence, according to the above - mentioned facts the benefit of exception under section 9(1)(vii)(b) cannot be availed by the applicant.

RULING

- Para 1 of article 12 of **India-China DTAA** is dealing with primary right of tax lies with resident country.
- As per para 2, the secondary right to tax “fees for technical services” lies with the source country in which payment arise. Royalties or fees for technical services may also be taxed in India in which they arise and if the resident of India is the beneficial owner of the royalties or fees for technical services the tax so charged shall not exceed 10% of the gross amount of the royalties or fees for technical services.
- Article 12(6) deems that the payment arises in the country of the payer. Therefore, in the distinguishing factor we are constrained to follow the ruling of Mumbai, ITAT in case of Ashapura Minichem Limited v ADIT (supra).
- The expression provision for services is much wider in scope that expression provision for rendering of services and will cover the service even when these are not rendered in the other contracting state as long as the services are used in the other contracting state. The technical services are clearly covered by article 12(4) of the treaty.
- It is also specifically covered by the deeming fiction under article 12(6) as well so it is taxable in India.

Taxinpic

Whether the below transactions covered under exception of Section 9(i)(viii)(b) of the Income Tax Act.

Services received by Indian Co. from outside India

With not fall under exception of FTS Hence taxable in India

Services from outside india used for export of service.

Although services are received for export purpose but since it is received by businesses in India and then exported it will be deemed to be consumed in India

With not fall under exception of FTS Hence taxable in India

Services received from foreign supplier by a branch of Indian business outside India

In this case since business is also conducted from outside India.

This will fall under exception and hence not liable to tax in India under FTS

OUR COMMENTS

- Even though the end customer might be a non-resident it cannot be the said that source of income is outside India further the end customer is non-resident then also it cannot be said that source is outside India as the service is provided to end customer from India.

- Thus just exporting business or getting the work done from outside India does not mean that business is conducted outside India. Business may be said to be conducted outside India, only if it has a place of business outside India.

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