SATURDAY INTERNATIONAL TAX GYAN !!!

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SITG No. 130

Digi Drives (P.) Ltd.

v.

Assistant Commissioner of Income Tax, Circle 1

Rendering of service of procurement of export orders by a foreign company to an Indian company does not fall in category of managerial/consultancy services

Date: 03.12.2022

[2021] 123 taxmann.com 4 (Delhi - Trib.)

Facts of the Case

- ❖ Assessee company is into the business of manufacturing and trading of panels, cold rolling mills and into export business and filed return of income at Rs. 3,17,11,520/- for the year under assessment i.e. AY 2016-17.

- ❖ Assessee company being into export business paid certain amount of commission to M/s. Taiyo Enterprises Inc. (for short 'TEI'), Japan for procuring order for supplying, installing and successful commissioning of cold rolling mill to Mabati Rolling Mills, a Kenyan company

- ❖ Commissioner (Appeals) made disallowance under section 40(a)(i) of Income Tax Act,1961 for failure to deduct tax concluding that services rendered by TEI to assessee company were in nature of 'consultancy services' covered under provisions of section 9(1)(vii) read with Explanation 2 as 'fee for technical service'.

Assessee's/ Petitioner's Contention

- Assessee contended that CIT(A) has wrongly considered commission receipts in the hands of M/s. Taiyo Enterprises Inc. as fee for technical services u/s 9(1)(vii) read with explanation 2 of the Income Tax Act 1961.

- Assessee further contended that CIT(A) has erred in applying the provisions of section 195 of the Act and that too without any basis and by recording incorrect facts and findings and without appreciating the facts and circumstances of the case and in violation of principles of natural justice and without considering the submission filed by the assessee.

Revenue's contention

- Ld. CIT (A) proceeded on the premise that TEI was having expertise, skill and knowledge about the market access in Kenya about the cold rolling mill to understand the technical requirement of such field of operation.

- Ld. CIT (A) also contended that EI procured the order for assessee and provided its advice, skill and expertise.

- Ld. CIT (A) reached the conclusion that services rendered by TEI to the assessee company were in the nature of "consultancy services" covered under the provisions of section 9(1)(vii) of the Act read with Explanation 2 as 'fee for technical services'.

Legal provisions

- **As per Section 9(1)(vii)(b) of Income Tax Act, 1961 -** income by way of fees for technical services payable by a person who is a resident, except where the fees are payable in respect of services utilized 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.

- **Further, fees for technical service has been defined in act as under**:

"fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries"

- **Article 12(1) of 'DTAA'** describes fees for technical services as under:

The term 'fees for technical services' as used in this article means payments of any amount to any person other than payments to an employee of a person making payments and to any individual for independent personal services referred to in article 14, in consideration for the services of a managerial, technical or consultancy nature, including the provisions of services of technical or other personnel.

Ruling

- Commission paid for arranging of export sales and recovery of payments cannot be regarded as consultancy service rendered by the non-resident.

- The non-resident had acquired skill and expertise in the field of marketing and sale of automobile products, but the non-resident did not act as a consultant, who advised or rendered any counseling services.

- The non-resident was appointed as a commission agent for sale of products within the territories specified and subject to and in accordance with the terms set out, which the non-resident accepted. **The non-resident, therefore, was acting as an agent for procuring orders and not rendering managerial advice or management services**.

- The non-resident had not undertaken or performed 'technical services', where special skills or knowledge relating to a technical field were required. Technical field would mean applied sciences or craftsmanship involving special skills or knowledge but not fields such as arts or human sciences.

Ruling

- TEI is not having any Permanent Establishment (PE) in India and the income of TEI received as commission from assessee company was not chargeable to tax in India as the same was neither accrued in India nor received in India and as such was not required to deduct tax at source u/s 195 of the Act.

- Also as per Memorandum of Understanding no evidence has been brought on record if TEI was having any managerial or technical expertise to provide technical services to the assessee company apart from procuring orders for the assessee company on commission basis

- The question framed was answered in favour of assessee as the payment made by assessee company to TEI is "commission payment" and not a "fee for technical services".

Our Comments

- ❖ Mere rendering of service of procurement of export orders or even import orders by a non-resident for resident person does not fall in category of managerial/consultancy services as explained in Explanation 2 to section 9(1)(vii) of Income Tax Act, 1961.

- ❖ If the non-resident was not acting as a manager or dealing with administration and if it was not controlling the policies or scrutinizing the effectiveness of the policies it cannot be said to have providing any consultancy or managerial service.

- ❖ In the current scenario although such services might not be falling under the definition of fees for technical service, however it can fall within definition of business connection u/s 9(1)(i) of the Income tax act if it fulfills the condition of SEP (Significant Economic presence). To read more about SEP **CLICK HERE**.

Section/Article	9 r.w.s 40(a)(i) and 195, Article 12
DTAA/Country	India – Japan DTAA
Court	Delhi Tribunal
Date of decision	24.08.2020

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

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