SATURDAY INTERNATIONAL TAX GYAN !!!

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Penta Media Graphics Ltd.

vs.

Dy. CIT/ACIT

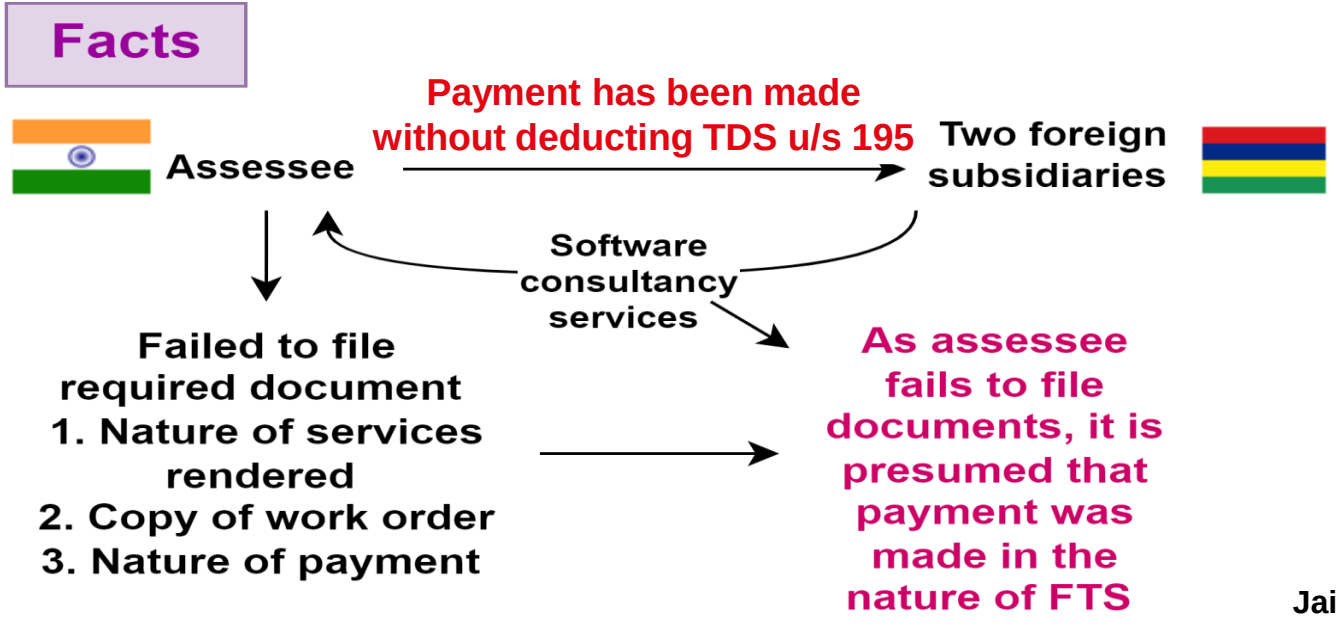
To determine taxability of International transaction proper invoices and agreements should be maintained.

Date: 24.12.2022

[2022] 142 taxmann.com 82 (Chennai - Trib.)

Facts of the case

Assessee made payment to two foreign subsidiaries located in Mauritius in respect of software consultancy charges without deduction of tax at source under section 195 and claimed the same as expense. Assessee did not file any document pertaining to the above transactions, A.O. held that assessee's case squarely fell under provisions of section 195 and it was liable to deduct tax at source while making such payment as same would be considered as FTS (Fees for technical service.



Income tax Act provisions

❖ **As per Income Tax Act 1961, Section 40(a)(i):**

40. Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession",—

(a) in the case of any assessee—

(i) any interest (not being interest on a loan issued for public subscription before the 1st day of April, 1938), royalty, **fees for technical services** or other sum chargeable under this Act, which is payable,—

(A) **outside India**; or

(B) in India to a non-resident, not being a company or to a foreign company,

on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in section 139(1)

India – Mauritius DTAA Provisions

- **Article 12A*(5) of India- Mauritius DTAA-** Fees for technical services shall be deemed to arise in a Contracting State when the payer is that State itself, a political sub-division, a local authority, or a resident of that State. Where, however, the person paying the fees for technical services, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the liability to pay the fees for technical services was incurred, and such fees for technical services are borne by such permanent establishment or fixed base, then such fees for technical services shall be deemed to arise in the Contracting State in which the permanent establishment or fixed base is situated.

- Inserted w.e.f. 01.04.2017

Assessee's Contention

- Assessee contends that:
  1. Payments to subsidiaries were made out of income earned outside India which falls outside the ambit of Section 195 of Income Tax Act.
  2. Subsidiaries to which payments were made do not have any permanent establishment in India and services were rendered and received outside India.
  3. India-Mauritius DTAA included FTS w.e.f. 01-04-2017 and the same was not taxable in this A.Y. as the appeal was related to A.Y. 2010-11 & 2012-13.

Revenue contention

1. The AO noted that the assessee has not deducted TDS under the provisions of section 195 of the Act and no proper documents have been provided.

2. The assessee case squarely falls under the provisions of section 195 of the Act, as the payments made under software development expenses falls within the ambit of these provisions and assessee company is liable to deduct TDS while making such payment as the services are considered as fees for technical service.

3. Despite various opportunities, assessee fails to file the documents required by the A.O.

Ruling

- Assessee has **not submitted any documentary evidence** (i.e., Nature of services rendered, Copy of agreement , nature of payment etc.) despite various opportunities. The ld. counsel for the assessee stated that these are very old documents and now the assessee cannot file these documents.
- It is admitted that the payment abroad was made for “software consultancy charge” which squarely falls within the definition of “Fee for technical services” as per Sec.9(1)(vii) of the IT Act.
- Also, the appellant's contention that the subsidiary company had no business connection in India is not acceptable, as the income has accrued and arisen to the foreign subsidiary company in India, in view of Explanation to sec.9(2) in which it is clearly stated that the revenue need not prove the business connection of the payee in India for bringing it to tax u/s 9(1).
- Therefore, as assessee failed to file required documents, it was to be presumed that payment made abroad for software consultancy charges was in nature of fee for technical service as per section 9(1)(vii) and assessee's case squarely fell under provisions of section 195.

OUR COMMENTS

- To determine the taxability of any international transaction it is advisable to have all the supporting documents in relation to such transaction i.e. invoice, agreement wherein the nature of service being provided is mentioned in descriptive manner and tenure of such service. Further, such documents should be maintained till the assessment is not completed.

- Further, Form 15CB requires CA to certify nature of foreign remittance for taxability purpose based on documents submitted by client hence it is the duty of CA also to maintain all the documents, although he is not required to check the authenticity of such documents.

- As discussed in the above case, if the required documents are not submitted then the expenses could be disallowed by AO for non-deduction of TDS or incorrect deduction. This makes it mandatory to take and preserve required documents.

Court	ITAT Chennai
Date of decision	15.06.2022
Section/Article	Section 195 and 40a(i) & Article 12 of DTAA
DTAA/Country	India, Mauritius

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

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