

SATURDAY INTERNATIONAL TAX GYAN !!!

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SITG No.
135

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Vs

Deputy Commissioner of Income Tax

Sales and customer support services received outside India cannot be considered as accrued in India as per Sec 9(1)(vii)

Date: 07.01.2023

Facts of the Case

- ❖ Assessee is a company which is tax resident of Germany. The Assessee entered into a commissionaire agreement with an Indian company. Assessee was appointed as a non-exclusive sales representative on a global basis to promote & distribute the products of the Indian company.
- ❖ Assessee received remuneration for providing such customer & support sale service.
- ❖ Assessee is otherwise engaged in the business of publishing of books & journals in the field of research, education & professional business.

Assessee's Contention

- ❖ Assessee contended that they have provided customer and support sale service to the Indian Entity and it is not a managerial service as the managerial service essentially involves, controlling, directing and administering the business.

Revenue's Contention

- ❖ Assessing Officer formed a strong belief that the entire receipt of remuneration received by the Assessee is taxable as Royalty u/s 9(1)(vi) of Income Tax Act & under the relevant article of DTAA with Germany.
- ❖ CIT(A) was of the firm belief that the assessee was involved in the performance of Managerial services to the Indian Company, therefore the remuneration must be considered FTS.

Legal provisions

As per Section 9(1)(vii) of Income Tax Act, 1961 –
income by way of **fees for technical services** payable by—

- a) the Government ; or
- b) 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 ; or
- c) a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India:

Where Fees for Technical Services means: For the purposes of this clause, "*fees for technical services*" means any consideration (including any lump sum consideration) for 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";

Ruling

- ❖ The above matter was challenged before the Id. CIT(A), who was convinced with the view that the remuneration so received is not Royalty but could be FTS as per the India-Germany DTAA.
- ❖ For the definition of the term “Management”, the commentary to the UN Model was referred- the term management involves the application of **knowledge, skill or expertise in the control or administration of the conduct of a commercial enterprise or organization**. Thus, if management of complete or significant part of an entity is done by a person other than the employees, then it would be considered as FTS.
- ❖ Similarly, adjective '**managerial**' relates to manager or management and has no separate meaning.
- ❖ The term **Consultancy** has been defined as- the work or position of consultant or department of consultants. 'Consultant' mean person who gives professional advice or services in a specialized field.

Ruling

❖ It was held that:

- **Managerial service** means managing the affairs by laying down the policies, standards & procedures and then evaluating the actual performance.
- It is clear that assessee was appointed as a agent for sale of products within the territories specified in accordance with the terms to which the assessee accepted. The non-resident, therefore, was acting as an agent for procuring orders and not rendering managerial advice or management services.
- In the instant case, it is seen, admittedly that the Assessee agent was only providing customer & support sale service. No other services were rendered other than the above. **The said services also does not require any contribution of technical knowledge, experience, expertise, skill or technical know-how of the processes involved or consist in the development and transfer of a technical plan or design.**

Thus, in light of the above, findings of Id. CIT(A) were set aside & AO was directed to delete the impugned addition.

Our Comments

- ❖ Where a foreign agent of Indian exporter operates outside Indian territories for procuring export orders and providing support sale service for orders which are sold outside India, no part of agent's income can be said to accrue or arise in India.
- ❖ The Finance Act, 2018 has introduced the significant economic presence (SEP) provisions in India, which provides that if the service rendered by the commission agent exceeds INR 2 crore in a financial year, such non-resident agent may be considered as having a business connection in India due to the SEP provision under section 9(1)(i) of the Act.
- ❖ If the agent falls in the above criteria, then he needs to obtain the TRC in order to claim the benefit of DTAAs. Where the agent does not form a PE in India, he can claim the benefit of the DTAA and again he would not be liable to pay tax in India.
- ❖ We need to keep in mind **Place of supply** of the services or goods provided by the supplier of service and also the business for which the same material or service is utilised. If it is utilised for business outside India, then it shall not come under the ambit of '**Fee for Technical Services (FTS)**' as per Section 9(1)(vii), and therefore shall not be taxable.

Court	Delhi Tribunal
Date of decision	23.08.2022
Section/Article	Section 9(1)(vi) of Income Tax Act & Article 12 Of DTAA
DTAA/Country	India-Germany

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



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