

SATURDAY INTERNATIONAL TAX GYAN !!!

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SITG No.
158

Google LLC

Vs

Deputy Commissioner of Income Tax

Payment made to a Non-Resident Company with respect to the seconded employee would not be considered as income or covered under FIS/FTS or Article 12 of India-USA DTAA

Date: 17.06.2023

Jain Shrimal & Co.

Facts of the Case

- ❖ Assessee (Google LLC) is a USA-based company that seconded its employees to GIPL, its Indian AE, and received payments for the same.
- ❖ GIPL had duly deducted TDS in the name of employee under section 192 against salary and other allowances which is evident from Form No. 16.
- ❖ During the A.Y. 2010-11 and 2012-13, A.O. issued notices u/s 148 as the assessee has received certain payments from GIPL, and returns of income were not filed.
- ❖ The AO observed that when the transaction is analyzed in its totality, the arrangement between GIPL and the assessee is such that GIPL required technical services from the assessee, which were to be provided through certain employees of the assessee who were technical and managerial experts in their respective domain.

- ❖ In a normal course of action this would amount to a service agreement, however, in the present case, the assessee would have provided professional services to GIPL against which GIPL would have made payments to the assessee.
- ❖ The AO passed the draft assessment order by bringing a tax to the sum of Rs. 20,63,50,635 and a sum of Rs. 39,48,22,872 for the A.Y.s 2010-11 and 2012-13 respectively.

Assessee's Contention

- ❖ Google India Private Limited (GIPL) had deducted TDS under section 192 of Income Tax Act and deposited the same with the Government which was evident from Form No. 16 issued to employees.
- ❖ The assessee believes that during the period of secondment, employees were working under the complete control and supervision of GIPL and not on behalf of the assessee, in the present case, it is Google LLC.
- ❖ The assessee's role was mere of a facilitator payment of salary on behalf of Google India, which was reimbursed by GIPL on the cost to cost basis.
- ❖ Payment made to the assessee with respect to secondment would not be considered FIS/FTS. Such inference has been drawn from section 9(1)(vii) of the Income Tax Act or Article 12 of the India-USA DTAA treaty.
- ❖ Alongside, the assessee has also placed reliance on the decision of **Flipkart Internet (P.)Ltd. Vs. DCIT**, where the case was decided on the same facts.

Revenue's Contention

- ❖ The Assessing Officer opined that the arrangement between GIPL and the assessee was such that GIPL required technical and managerial services from the assessee which fall under FIS category of DTAA of the India and USA. Such services were provided through certain employees of the assessee.
- ❖ He reopened the assessment on the same grounds, i.e., such services were technical and managerial in nature and therefore, such an arrangement would fall under DTAA and be covered as Fees for Included Services (FIS). Moreover, the return of income was not filed for making such payments or receiving such payments.
- ❖ Consequently, for the assessment years 2010-11 and 2012-13, AO passed a draft assessment order by bringing to tax a sum of Rs. 20,63,50,635 and a sum of Rs. 39,48,22,872 respectively.

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 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.

As per Article 12 of India-USA DTAA, Fess for Included services means payment of any kind to any person in consideration for the rendering of any technical or consultancy services including through the provision of services of technical or other personnel) if such services :

- a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received ; or
- b) make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design

Ruling

- ❖ Hon'ble Tribunal has relied on the judgment of the jurisdictional High court in the case of Flipkart and coordinated bench order of the Bangalore Tribunal in the case of **Biesse Manufacturing Company (P.) Ltd** and decided that the seconded employees are under the complete control of Indian companies and therefore, the Indian company has correctly deducted TDS on such salary paid to seconded employees.
- ❖ Further, it was also accepted that the assessee was merely acting as a facilitator for making payment to salary to seconded employees and accordingly no TDS was supposed to be deducted on payment made to the assessee. The payment made by an Indian company to the assessee will not be considered as FIS or technical services.

Our Comments

- ❖ Since employees are under full control of an Indian company the payment made for such employees would be liable for TDS u/s 192 of the Act.
- ❖ Further, since the company has already deducted TDS on such payment u/s 192 of the Act which has been deposited with the government, deducting TDS again on the same amount remitted to a foreign company would lead to a double deduction of tax.
- ❖ It is important to note that employees still have the employer-employee contract with the GIPL, and not with Google LLC (the assessee, in this case) even during the performance of a short assignment performed by the employees of GIPL.
- ❖ Looking at the series of judgements on the issue of seconded employees it can be concluded that Indian company has to deduct TDS u/s 192 of the Act

Section/Article	9(1)(vii) of the Income Tax Act, Article 12
DTAA/Country	India - USA DTAA
Court	Bengaluru Tribunal
Date of decision	20.02.2023

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



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