SATURDAY INTERNATIONAL TAX GYAN !!!

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SITG No. 175

Cadila Healthcare Ltd.
Vs
DCIT (IT) - 1

Payment made to non resident for technical services rendered outside India in relation to export by an Indian company would not fall within exception to FTS u/s 9(1)(vii)(b)

14.10.2023
Jain Shrimal & Co.

[2022] 142 taxmann.com 211 (Ahmedabad - Trib.) [09-09-2022]

Facts of the Case

- The assessee is a global pharmaceutical company having its principal place of business at Ahmedabad, India. With a core competence in the field of healthcare, the assessee provides healthcare solutions ranging from formulations, active pharmaceutical ingredients and animal healthcare products etc.

- During the assessment year 2013-14 year, the assessee made remittances to four parties of USA, one-party of Canada and one-party of Mexico for clinical trials, in respect of which no TDS was deducted.

- The AO was the view that the assessee was liable to deduct taxes on such a remittances made to overseas parties and accordingly he raised the tax demand of Rs. 96,59,334/- and interest amounting to Rs. 62,88,969/- (amounting to a total of Rs. 1,59,48,303/-).

Assessee's Contention

- In case of payments made to parties situated in **Canada and USA**, assessee contented that in India-USA DTAA and India-Canada DTAA, there is **make available** clause which needs to be satisfied in order to make the fees for technical services taxable in India and the same is not satisfied in case of assessee hence, assessee is not liable to deduct TDS on such payments.

- With regard to the payments made for clinical trials to party **situated in Mexico**, assessee argued that the case of the assessee is falling under the exception provided in **section 9(1)(vii)(b)** of the Act that since the services were both rendered as well as utilized outside India, the same are not chargeable to tax in India.

Revenue's Contention

The revenue in response to the assessee; submitted the following :

- Make available clause can be satisfied not only when there is transfer of technology in the sense that the use of service should be enabled to do the same thing next time without recourse to the service provider but development and transfer of a technical plan or technical design would also qualify as FTS as per the treaties.

- Revenue denied the contention of assessee that export activity having taken place in India, the source of income was located in India and not outside India. There is a difference between the "source of the income outside India" and the "source of receipt of the money outside India".

Legal Provisions

According to Section 9(1)(vii), of Income Tax Act, 1961,

Section 9(vii) 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 :

Provided that nothing contained in this clause shall apply in relation to any income by way of fees for technical services payable in pursuance of an agreement made before the 1st day of April, 1976, and approved by the Central Government.

Explanation 1…

Explanation 2.—For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consi-deration) 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"

Legal Provisions

❖ **Article 12 of India-USA DTAA & India-Canada DTAA -**

4. For purposes of this Article, “Fees for included services" means payments 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.

❖ **Article 12 of India and Mexico DTAA-**

3. (b) The term "fees for technical services" as used in this Article means payments of any kind, other than those mentioned in Articles 14 and 15 of this Agreement as consideration for managerial or technical or consultancy services, including the provision of services of technical or other personnel.

Make Available

- To fit into the terminology "making available", the technical knowledge, skill, etc., must remain with the person receiving the services even after the particular contract comes to an end. It is not enough that the services offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider have gone into it.

- There has to be a **transfer of technology** in the sense that the **user of service should be enabled to do the same thing next time without recourse to the service provider**.

- The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. **Technology will be considered "made available" when the person acquiring the service is enabled to apply the technology.**

Ruling

In case of payments made to USA and Canada-

- There was no intention that any technology shall be "made available" to the assessee company in lieu of such payments in a manner that the assessee company is enabled to apply the technology without depending on the overseas companies from whom such services have been availed. The Ld. CIT(Appeals) held that the common thread in tax treaties of USA and Canada is the requirement of **"make available"** clause to invoke the taxability under the head "fee for technical services/included services". Thus, where the recipient of technical services does not get equipped with the knowledge or expertise and the recipient would not be able to apply the technology in future independently without support from the service provider, it will not be a case of technical service having been "made available"

- Further, the assessee has entered into an agreement for provision of clinical testing services, and there is no agreement for development or transfer of a technical plan or design, and hence, in our considered view, there is no scope for invoking the provisions of FTS in India-USA DTAA & India-Canada DTAA.

- The appeal of assessee was allowed in case of payments made to USA and Canada since the payments does not fall in the purview of make available clause in DTAA, such payments cannot be classified as FTS hence it is not taxable.

Ruling

In case of Payments made to Mexico -

- With regard to the assessee contention that as assessee is receiving the income outside India, assessee falls in the purview of exception of Section 9(1)(vii)(b) hence such income is not taxable in India, it was held that In order to fall within the second exception provided in section 9(1)(vii)(b) of the Act **the source of income, and not source of receipt, should be situated outside India**. Mere fact that the export proceeds are marinated from persons situated outside India did not constitute them as a source of income outside of India. The income component of the monies or the export receipts is located situated in India. Accordingly, since the assessee is an exporter of products in India and all the **activities related to the business of the assessee are carried out in India** and source of income is with India. **India-Mexico Treaty does not have the "make available" clause to invoke the taxability under the "fee for technical/included services" hence this income is taxable in India.**

- The payment made by the Appellant to the Mexico Company is in the nature of technical services as per section 9(1)(vii) and explanation of section 9(2) of the Income-tax Act, 1961 as well as under tax treaty under Article 12. Therefore, TDS is applicable u/s 195 of the Act and the Appellant is in default u/s 201(1)/201(1A) for not deducting TDS u/s 195 of IT Act, 1961 on payment made to Cliantha Research Mexico.

Our Comments

- The exception provided in the provision of Section 9(1)(vii)(b) deals with relief from taxability of FTS in India if it consumed for business or profession carried on outside India or for earning any income sourced outside India.

- However, in the law it is nowhere defined what is considered as a business outside India or what is income sourced outside India but just exporting goods or service outside India would not in itself mean that income is from business outside India or sourced outside India.

- It will depend on the fact that whether the services were received by Indian company for a establishment or branch outside India then in that case it could be considered as falling under the exception to provision of Section 9(1)(vii).

Section/Article	Section 9(1)(vii)(b) & Article 12 of DTAA
DTAA/Country	India-USA, Canada & Mexico DTAA
Court	Ahmedabad ITAT
Date of decision	09.09.2022

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