SATURDAY INTERNATIONAL TAX GYAN !!!
#taxmadeeasy

SITG No. 213

DCIT (International Taxation)

v.

Zydus Lifescience Ltd.

Services provided by non-residents did not involve any transfer of technology therefore said payment was not for technical services and hence not liable for TDS.

06.07.2024

[2024] 163 taxmann.com 48 (Ahmedabad)[17-05-2024]

Jain Shrimal & Co.

Facts of the Case

- Assessee is a company having principal place of business at Ahmedabad, India and engaged globally in pharmaceutical business and assessee company have a core competence in the field of health care.

- During the year under consideration, assessee company made foreign remittances to below certain parties in USA and Canada in relation to Clinical trials service and the assessing officer disallowed the payment made and raised demand under section 201 of the Act.

Algorithem Pharma Inc- USA	**Rs. 4,53,20,847**
Pharmanet Canada Inc	**Rs. 15,07,489**
Cetro Research –USA	**Rs. 26,61,901**
Hilltop Research-USA	**Rs. 2,14,51,689**
Impopharma Inc- Canada	**Rs. 23,36,320**
Lambada Therapeutic Research- Canada	**Rs. 47,73,195**
Novume Pharmaceuticals Research-Canada	**Rs. 1,88,20,283**

Assessee's Contention

- In relation to remittance made for clinical trial services, such services fall under the purview of fees for technical services.

- Further, assessee company contented that service provider did not make available it's technical knowledge, experience, skill, know how etc. which independently perform the technical function himself in future without the help of service provider.

- Therefore, assessee company contends that such payment was not liable to tax deducted at source under the provisions of section 195 of the Income Tax Act when read along with DTAA.

Revenue's Contention

- The revenue referring the specific provisions of FTS in DTAA of India-USA/Canada and contented that clinical trial services are highly technical in nature and considerable technical information is required for conducting test.

- Further, the **revenue contented that the 'make available' clause is not to be applied merely with respect to technical knowledge but also with respect to experience, skill and process**. If experience or skill is made available to the assessee, then make available clause would be satisfied and the nature of service would fall under fee for technical/included services and required to deduct tax under section 195 of the Act and raised demand under section 201(1)/ 201(1A) of the Act.

Legal Provisions

Section 195 of Income Tax Act is as under:

- Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest referred to in section 194LB or section 194LC) or section 194LD or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force:

Section 201 of Income Tax Act is as under:

- (1) Where any person, including the principal officer of a company,—
  (a) who is required to deduct any sum in accordance with the provisions of this Act; or
  (b) referred to in sub-section (1A) of section 192, being an employer,

does not deduct, or does not pay, or after so deducting fails to pay, the whole or any part of the tax, as required by or under this Act, then, such person, shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax:

Legal Provisions

Article 12 of India-USA/Canada DTAA:

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.

Ruling

- Hon'ble tribunal held that in tax treaties there is make available clause and only rendering of technical services not sufficient to call for taxability under FTS. Therefore, for the purpose of taxability, technology should be actually transferred to the assessee.

- Hon'ble Delhi court in case of DIT v. Guy Carpenter & Co Ltd [2012] 346ITR 504 and Hon'ble Karnataka high court in case of CIT v. De Beers India Minerals (P.)Ltd. [2012] 21 taxmann.com 214 where Hon'ble High court held that **technical or consultancy services rendered should be of nature that it "makes available" to the recipient technical knowledge, know-how, skill and such knowledge, skill must be remain with the receiver**.
- The AO is found not justified in holding that mere provision of study report (or test/ trial results) by the service providers makes the technology/know how available to the appellant and that even deputing its employees at the time of study has in any way made available the technology to the appellant because **it is well settled principal that mere provision of technical services is not enough to attract withholding tax under the DTAA.**

- Therefore, payment made by the assessee on account of services acquired in relation to clinical trial was allowed and not required to deduct TDS under section 195 of the Act and eliminate the demand raised under section 201 of the Act.

Our Comments

- In such cases we have seen that when company acquired technical services from the Non-residents then in the tax treaties we need to check whether the FTS clause is available or not. If the FTS clause is available then we need to check whether the 'Make available clause' is satisfied or not. If Make available clause is satisfied then such services considered under the FTS and taxable in India.

- If the FTS clause is not available in the tax treaties then such services will fall under the business profits. Then we need to check if PE of service provider is available in India then such services will taxable in India as per normal tax rate. Further, if such service is a business of assessee then we should not directly jump to Other income clause.

- In case of 'make available' clause it is very difficult to determine whether the knowledge is being made available or not. Thus, it is important to keep an agreement which shows the scope of such service and whether the service recipient would be able to perform the same service and also be able to teach other such service.

- If there is a branch of an entity in foreign country wherein it avails the service of clinical trial for the foreign entity itself then in that case such service could fall under the exception of 9(1)(vii) and accordingly not taxable in India as FTS under Income tax act as well.

Section/Article	Article 12 of DTAA, Sec 195/201of IT Act
DTAA/Country	India-USA/Canada
Court	Ahmedabad Tribunal
Date of decision	17.05.2024

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

Visit our website blog for previous case laws.-
https://jainshrimal.com/blog/#taxgyaan

Join Whatsapp group for discussion on International taxation By scanning the QR-

Disclaimer

- This presentation has been prepared on the basis of information available in the public domain and is intended for guidance purposes only.
- Jain Shrimal & Co. has taken reasonable care to ensure that the information in this presentation is accurate. It however accepts no legal responsibility for any consequential incidents that may arise from errors or omissions contained in this presentation.
- This presentation is based on the information available with us at the time of preparing the same, all of which are subject to changes which may, directly or indirectly impact the information and statements given in this presentation.
- Neither Jain Shrimal & co., nor any person associated with us will be responsible for any loss however sustained by any person or entity who relies on this presentation. Interested parties are strongly advised to examine their precise requirements for themselves, form their own judgments and seek appropriate professional advice.