



SATURDAY INTERNATIONAL TAX GYAN !!!

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SITG No. 236

Avtec Ltd.

v.

ACIT

Payments for warehousing services do not qualify as 'Fees for Technical Services' (FTS) under Section 9(1)(vii) of the Income Tax Act or relevant DTAA, as such services are logistical in nature and do not 'make available' technical knowledge, skill, or expertise to the recipient. Consequently, they are not taxable as FTS.

14.12.2024



Facts of the Case

- ❖ The assessee, **Avtec Ltd.**, entered into a contract with **ESG International Inc.**, a U.S.-based independent warehouse service provider, to use warehouse facilities in the USA.
- ❖ Payments was made for warehousing charges outside India for business operations involving storage, quality checks, and delivery of materials to overseas customers.
- ❖ During the course of assessment proceedings, the Assessing Officer noticed that the assessee had not deducted TDS on the payment made to ESG International. The Assessing Officer was of the view that the scope of services under the contract include managerial/technical services and consequently the payment made to ESGI was in the nature of Fees for Technical services. Therefore, on such services, TDS was required to be made.

Assessee's Contention

- ❖ Payments made to ESG International were not taxable in India as the services were rendered entirely outside India for international operations.
- ❖ The scope of the services was limited to warehousing, which did not involve any managerial, technical, or consultancy components.
- ❖ Even if the payment was categorized as Fee for Technical Services (FTS) under domestic law, the **India-USA DTAA** definition of FTS does not include "managerial services" and requires the technical services to "make available" (*"**make available**" means that the service must not just solve a technical problem or provide advice; it must **enable the recipient to use the technical knowledge in the future***) technical knowledge, which was not the case here.
- ❖ The Id. AR argued that an application under Section 195(2) is only needed if there is doubt about the taxability of the payment, which is not the case here.

Revenue's Contention

- ❖ AO argued that the services rendered involved managerial or technical elements, qualifying as FTS.
- ❖ The AO contended that the warehousing services included managerial/ technical services, categorizing the payment as Fees for Technical Services (FTS) under Section 9(1)(vii) of the Income Tax Act, 1961, and disallowed the payment.
- ❖ The AO believed that since the payment was made to a non-resident, the assessee was obligated to deduct TDS under **Section 195**.
- ❖ AO stated that the assessee should have applied under Section 195(2) if there was any doubt about taxability.

Legal provisions

Section 9 of the Income-tax Act, 1961

(1) The following incomes shall be deemed to accrue or arise in India :—

(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 :

Legal provisions

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.—For the purposes of the foregoing proviso, an agreement made on or after the 1st day of April, 1976, shall be deemed to have been made before that date if the agreement is made in accordance with proposals approved by the Central Government before that date.

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

Royalties And Fees For Included Services

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.

Legal provisions

Notwithstanding paragraph 4, "fees for included services" does not include amounts paid:

- (a) For services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property other than a sale described in paragraph 3(a);
- (b) For services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships or aircraft in international traffic;
- (c) For teaching in or by educational institutions;
- (d) For services for the personal use of the individual or individuals making the payments; or
- (e) To an employee of the person making the payments or to any individual or firm of individuals (other than a company) for professional services as defined in Article 15 (Independent Personal Services)

Ruling

- ❖ Hon'ble Tribunal held that the payment was made for warehousing services provided entirely outside India, which did not qualify as "income accruing or arising in India" under **Section 9**.
- ❖ The ruling mentioned that in India-USA DTAA, definition of FTS does not include "managerial services," and the services rendered by ESG International did not involve any transfer of technology or technical knowledge.
- ❖ Also, the "make available" clause under the DTAA was not satisfied as no technical expertise was imparted to the assessee.
- ❖ Thus, the payment was not subject to TDS under Section 195.

Our Comments

- ❖ Payment for the use of a warehouse for storage and order management does not constitute 'Fees for Technical Services' (FTS) under Section 9(1)(vii) of the Income Tax Act or relevant DTAA provisions, as such activities are purely logistical.
- ❖ Further, there is no 'make available' of technical knowledge, skill, or expertise in such service to the recipient. Accordingly, such payments are not taxable as FTS.

Section/Article	Section 9 of the Income-tax Act, 1961 read with article 12 of DTAA
DTAA/Country	India USA DTAA
Court	ITAT Delhi
Date of decision	29-11-2024

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



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