Tenet Tax & Legal Private Limited

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ITAT remands matter to AO due to non examination of provisions of DTAA while taxing the receipts.

Summary – The Mumbai ITAT has recently pronounced a decision in the case of Haldor Topsoe, (the Assessee). The assessee, a chemical technology company in Denmark, received certain sum from its Indian client for supply of technical data to meet the requirements of the plant supplied. The assessee claimed that the receipt was exempt from tax on ground that fees for technical data formed an integral part of price of equipment. The Assessing Officer and DRP disallowed the claim and treated the sum as fees for technical services on ground that separate agreements was entered into for supply of technical know-how and equipment. The ITAT held that since certain crucial aspects, facts relating to two separate agreements and provisions of DTAA had not been properly examined, in the interest of justice, the matter was to be remanded to the Assessing Officer for deciding the issue after consideration of all the relevant facts.

Facts

- The assessee a chemical technology company in Denmark entered into agreement with and Indian company for supply of equipment along with specific design and technical data to meet the requirement of plant. It claimed that amount received from the Indian company was exempt from tax on ground that it was received towards engineering fee which formed an integral part of supply of equipment.

- However, the Assessing Officer made addition holding that fee received by assessee was for supply of technical know-how in India and did not form part of goods imported by Indian client.

- The Dispute Resolution Panel (DRP) upheld the Assessing Officer's order on ground that two separate agreements had been entered into by assessee one for supply of equipment and another for supply of technical know-how services.

- On appeal, before the Tribunal, assessee contended that the Tribunal in earlier years had held that the payment received formed an integral part of price of equipment. Therefore, amount received could not be considered as royalty under section 9 or under article and 13 of the Indo-Danish Tax Treaty.

- On the other hand, the revenue contended that facts of the year under consideration are distinguishable from the facts of earlier years as decision of Supreme Court in case of Ishikawajma Harima Heavy Industries as well as retrospective amendment in section 9 had not been considered in the earlier years. Further, in earlier years Tribunal had decided the issue in terms of royalty whereas for the year under consideration DRP has held that payment is covered as FTS.

Held

- There is no dispute that in the earlier years, the issue has been decided by the Tribunal; but on the issue of royalty and not FTS.

- In the subsequent Assessment year, the Tribunal had allowed the earlier years order and decided the issue in similar terms. It is clear from the decision of the Tribunal for the earlier years that the payment received by the assessee towards the information, design and other material was held as necessary for installation of the equipments supplied by the assessee as an integral part of the payment for the supply of the equipments and therefore, not covered under the expression 'royalty' provided under section 9(1)(vi) as well as under DTAA.

- It is clear that the DRP held that the payment received by the assessee is towards the supply of technical know-how and therefore, it was treated as fee for technical services in terms of section 9(1)(*vii*) as well as *Explanation* to section 9 introduced by the Finance Act, 2010 retrospectively with effect from 1-4-1976.

- It is to be noted that the decision in the case of the assessee in the earlier years were prior to the retrospective amendment in section 9 whereby the *Explanation* has been introduced retrospectively by the Finance Act 2010. Further, the decision of Supreme Court in the case of *Ishikawajma-Harima Heavy Industries Ltd*. v. *DIT* [2007] 288 ITR 408/158 Taxman 259 has also not been brought to the notice of the Tribunal and therefore, the same was not considered.

- The Tribunal observed that the lower revenue authorities have decided the issue by treating the payment as fee for technical services; however, the crucial fact of having two separate agreements has been ignored and further the provisions of DTAA have also not been considered.

- Since the facts are distinguishable in the year under consideration and the decision of the Supreme Court in the case of *Ishikawajma-Harima Heavy Industries Ltd*. (*supra*) as well as the retrospective amendment in section 9 has not been considered in the earlier years, therefore, the issue has to be decided on the basis of the facts of the year under consideration.

- Accordingly, the Tribunal concluded that since certain crucial aspects and facts related to two separate agreements and provisions of DTAA as well as decision of Supreme Court in the case of *Ishikawajma-Harima Heavy Industries Ltd*. (*supra*) have not been examined by the Assessing officer therefore, the matter needs to be remanded back to the Assessing Officer for a re-examination.