Payments for launching and tracking of satellite aren't FTS as no technology is made available to assessee

Summary – The Karnataka HC in a recent case of ISRO Satellite Centre, (the Assessee) held that where foreign companies did not make available or transfer any technology to the assessee payments could not be held as fees for technical services in view of article 13 of India - France DTAA and article 12 of India - USA DTAA.

Facts

- The assessee, ISRO Satellite Centre, was in business of manufacturing of satellites. It entered into an agreement with A, a French company, for placing its satellites in Geostationary Transfer Orbit in the space. The assessee was required to carry the satellites to the location of the launch pad of 'A'. Apart from launch services, 'A' provided several services as per the agreement, which were highly sophisticated and involved complex technologies. Therefore, the Assessing Officer held that payments received by 'A' were fees for technical services under section 9(1)(vii) as per DTAA between India and France and that assessee was required to deduct tax at source as per sections 115, read with section 195.

- Similarly, assessee had also entered into an agreement with 'I', an American company, for tracking, telemetry and command support charges for satellites launched by the assessee. Payments for same were also held to be fees for technical services under section 9(1)(vii) and DTAA between India and USA.

- The assessee was held to be an assessee in default under section 201(1) since proper taxes had not been deducted, and tax and interest was levied on assessee for same. On appeal, the Commissioner (Appeals) confirmed the order of the Assessing Officer.

- On second appeal, the Tribunal took a view that 'A' only provided a launching medium to assessee which was similar to hiring of a transport medium, as the assessee had to carry the satellite at the launch site. It also opined that 'I' provided only tracking information to the assessee. Therefore, both the services were held to be not in the nature of technical services. It was further held that assessee was not liable to deduct any tax at source, and therefore, interest already paid by assessee was to be refunded.

Held

- The contract entered into between the assessee and the French company, which also provides for the nature of assistance rendered, makes it very clear that it is not a case of mere transporting the satellite from the earth to the orbit. It is certainly not hiring the facilities to the assessee. Once the assessee delivers the satellites for launching the same into the orbit, as is clear from the terms of

the agreement, a series of complex technical operations have to be conducted by the French company which also includes launching the satellite into orbit. Therefore, the finding recorded by the Tribunal that the remuneration paid by the assessee to 'A' is in the nature of hire charges, on the face of it, cannot be accepted. The remuneration paid is for technical services rendered by 'A' to the assessee for launching the satellite into the orbit. It squarely falls within the definition of technical services as defined under the Act.

- *Explanation* 2 to clause (vii) of section 9(1) makes it clear that fees for technical services means any consideration including a lump sum consideration for 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. Admittedly, the services rendered by the non-resident do not involve any assembly, mining or like work. The services rendered are purely technical in nature. Therefore, the income by way of fees for technical services payable by a person who is a resident, is 'fees for technical services' unless the fees are payable in respect of services utilized in a business or profession carried on by such person outside India or for the purpose of making or earning any income from any source outside India as per Section 9(1)(viii)(b).

- In the DTAA read with protocol as per article 12, which deals with royalty and technical services etc., the services are called FTS only if such services make available technical knowledge, experience, skill, know-how, or processes or consists of development and transfer of technical plan or a technical design. Therefore, a non-resident could be charged only if the technical service rendered by him includes making available the technical knowledge or transferring such technical knowledge to a recipient. Therefore, unless this condition is fulfilled, the income derived by the non resident is not chargeable to tax.

- The said favourable clauses in the DTAA read with protocol override the provisions of the Income-tax Act in the matter of ascertainment of chargeability to income-tax and ascertainment of total income to the extent of inconsistency with terms of DTAC.

- In the instant case, it is not in dispute that the remuneration is only for the services rendered on a foreign soil. In lieu of consideration paid, the foreign company has not made available any technical knowledge to the assessee nor any technical knowledge is transferred to the assessee, and therefore, the income derived out of rendering technical services is not liable to tax. If there is no liability to pay tax by a non-resident, there is no obligation cast on the assessee to deduct tax at source.

- Similarly, even in respect of the services which is rendered by the American company, there is no transfer of technology or making available the technology which was used by them in detecting the satellite before it is brought under the control of the assessee.

- Accordingly, the HC held that the technical services rendered by these two foreign companies to the assessee do not satisfy the definition of the technical services as prescribed in the DTAA. As such it is not liable to tax. When once there is no liability to pay tax, the question of charging interest would not arise.

- Thus, all the revenue appeals, in view of the reasoning above, are dismissed and the substantial questions of law are answered in favour of the assessee and against the revenue. Taxes and interest paid were ordered to be refunded by the HC.

Comments

- This is a welcome judgment for all assessee's who have faced summary dismissals of their cases before the Revenue Authorities. The judgment clearly interprets the clauses of the India France and India USA DTAA as well as the concept of make available.