Support Service Receipts of Thai company from Indian consultancy company is not FTS

Summary – The Mumbai ITAT in a recent case of McKinsey & Company (Thailand) Co. Ltd., (the Assessee) held that where assessee-company, a resident of Thailand, provided data, information and other support services to its Indian counterpart so as to enable it to render strategic consultancy services, amount received by assessee for providing said services was to be regarded as "business profits" within meaning of article 7 of India-Thailand DTAA and in absence of assessee's PE in India, said amount could not be brought to tax in India.

Facts

- The assessee was a foreign company incorporated in and resident of Thailand. It was part of 'M' group of entities, the primary business of which was to render strategic consultancy services to their clients, which, *inter alia*, included the analysis of performance, developments, strengths and weaknesses of their clients, improving their profitability and productivity and similar other parameters.
- In order to analyze these parameters, the entities in various countries made use of certain data, information and other support provided by the assessee.
- The receipts for such services rendered by the assessee to its Indian counterpart were claimed as having been performed outside India and since these were rendered in the ordinary course of business, the same were claimed to be a 'business receipt'. In the absence of the assessee having any Permanent Establishment (PE) in India, it was claimed that no incidence of tax arose in India on this account.
- The Assessing Officer, however, treated said amount as 'Fees for technical services' and brought it to tax under Article 12 of the India-Thailand DTAA.
- The DRP upheld the Assessing Officer's action in treating the receipts as 'fees for technical services' includible under Article 12 of the DTAA. In said order, the DRP also referred to Article 22 of the DTAA.
- On appeal.

Held

- Para 1 of Article 12 of the DTAA provides that 'Royalties arising in a Contracting State and paid to a resident of the other Contacting State may be taxed in that other State'. The use of the expression 'may be taxed in that other State' shows that the amount of royalties is taxable not only in Thailand but also in India. Other paras of this Article deal with the meaning of the term 'royalties' and the rate at which such income is to be taxed.
- Obviously, there is no reference to the fees for technical services in Article 12 of the DTAA. Thus, it is evident that the fee for technical services does not fall within the purview of Article 12 of DTAA.

- The effect of para 7 of Article 7 of the DTAA is that if there is a 'business income' which is of the nature as covered under separate Articles such as 'shipping and air transport' under Article 8 or 'royalties' under Article 12, then such income would move out of Article 7 and be considered only under the specific Articles. The position which conversely follows is that if there is an income from the carrying on of the business by the assessee, which does not fall into any of the specific articles, then it would remain included under article 7 of DTAA.
- A bare perusal of Article 22 of DTAA taken note of by DRP, makes it abundantly clear that it deals with residual items of income which are not covered in any of the earlier articles of the Treaty. To put it differently, if an income is covered under one of the Articles then application of Article 22 is ousted on such income.
- In the instant case, the assessee earned income by rendering the services which are in the course of its business. Ordinarily, such income would remain under Article 7, unless specifically dealt by the other Articles.
- The case of the Assessing Officer is that Article 12 of DTAA is applicable. As noticed earlier that such Article deals only with 'royalties' and not 'fees for included services', obviously, the application of Article 12 has to be ruled out.
- In that view of the matter, such income would remain included under Article 7 and will not move in the lap of Article 22, which deals with items of income not expressly dealt with in the other Articles of the DTAA.
- As the nature of the extant income is such which is otherwise specifically covered under Article 7, it cannot be considered in the residual provision of article22 of DTAA.
- Once there is an income in the nature of 'business profits', its taxability can be considered only within the ambit of Article 7 of the DTAA. As the assessee is a tax resident of Thailand, the business profits can be taxed in India only if the enterprise carries on business in India through a Permanent Establishment (PE) situated in India.
- As it is not the case of the Assessing Officer that the assessee has a PE in India, the amount of income would fall under Article 7 of DTAA but cease to be taxable in India because of the absence of the PE.
- Whichever way one may view the income, the opinion of the authorities below of including it under Article 12 or under Article 22 of DTAA is not sustainable. The amount falls under Article 7 as 'business profits' and is hence not chargeable to tax because of the absence of any PE in India.
- It is, therefore, held that the amount in question falls under Article 7 and not under Article 12 or Article 22 of the DTAA.
- In the result, the appeal is allowed.