No need to establish rendition of services in India to tax FTS as long as payer is a resident

Summary – The Mumbai ITAT in a recent case of Toyo Engineering Corporation., (the Assessee) held that rendering of service is not a pre-condition for attracting section 9(1)(vii) when Fees for Technical Services are payable by a person who is resident in India.

Facts

- The assessee, a non-resident company incorporated in Japan, was engaged in various activities including undertaking work related to design, engineering, erection, equipment procurement, supervision and construction of chemical, fertilizer, petroleum, petrochemical and other plants. It operated in India through project offices established in India. During relevant years, the assessee executed offshore design contracts awarded by two Indian companies. The assessee had not offered to tax the income earned under the offshore design contract and claimed that the said income was not chargeable to tax in India. Alternatively the assessee argued before the Assessing Officer that the income earned under offshore design contracts was not attributable to the assessee's PE in India and hence, the same was not taxable as per the provisions of Indo-Japan DTAA.
- The Assessing Officer concluded that the revenue under project management contract and offshore design contract with Indian companies constituted Fees for Technical Services (FTS) and accordingly the revenue under offshore supply contract and offshore design contract earned by the assessee was held to be taxable in India.
- The Commissioner (Appeals) confirmed the action of the Assessing Officer in treating the revenue received by the assessee under the offshore design contract as royalty/Fees for Technical Services and taxable in India.
- On second appeal:

Held

Nature of revenue earned under offshore design contract

- There is no dispute so far as the contract has been executed in India and the assessee is having Permanent Establishment in India. So far as the nature of the revenue earned under offshore design contract is concerned, there is no dispute that the assessee has rendered the services which are technical in nature and nothing has been brought to contravent findings given by the Assessing Officer and Commissioner (Appeals) and that the revenue earned by the assessee under the said contract is not royalty/Fees for Technical Services. Even otherwise the assessee has not disputed that the revenue is earned for transfer of design for the purpose of execution of the project under the contract. Thus, the revenue earned by the assessee is for rendering the services and not sale of design.

Taxability of Fees for Technical Services

- As per clause (*b*) of section 9(1)(*vii*) if the Fees for Technical Services is payable by persons who is resident then there is no requirement that the services are rendered in India. Further after substitution of the Explanation below section 9(2) the income from Fees for Technical Services shall be deemed to be accrued and arised in India to a non-resident whether or not the non-resident has rendered services in India, or has any residence or place of business or connection in India. Therefore, rendering of service is not a pre-condition for attracting section 9(1)(*vii*) when the Fees for Technical Services are payable by a person who is resident. There is no dispute in the case in hand that the Fees for Technical Services are payable by the persons who is resident in India therefore, under the provisions of statute the income of Fees for Technical Services in question is taxable in India.

Taxability of Fees for Technical Services under DTAA

- There is no dispute that if a non-resident has a Permanent Establishment and Fees for Technical Services arise through a Permanent Establishment situated in the other contracting State then the provisions of para 1 & 2 of Article 12 shall not apply and such income for Fees for Technical Services/royalty will fall under the provisions of Article 7 or article 14 as case may be.
- In the case in hand, the assessee has categorically stated that the Permanent Establishment has no role in earning the Fees for Technical Services/royalty in question. Having said so that the Permanent Establishment of the assessee has no role in earning of the income from Fees for Technical Services under offshore design contract then the exclusion clause under article 12(5) of Indo-Japan treaty shall not be attracted and consequently the provisions of article 12 relating to Fees for Technical Services will be applicable.
- The authorities below have not considered the relevant provisions of DTAA and particularly article 12 of Indo-Japan treaty in the light of the terms and conditions of the contract in question to arrive at the finding that the income in question is taxable in India even under Indo-Japan DTAA. Accordingly in the interest of justice, this issue is to be remitted to the record of the Assessing Officer for limited purpose of examination of the contract in question and taxability of the income under the said contract as per the provisions of article 12 of Indo-Japan DTAA.