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If no human intervention is involved, such services cannot be covered under section 9(1)(vii)

Summary – The Agra ITAT in a recent case of Metro & Metro, (the Assessee) held that when no human intervention is involved in any services, such services cannot be treated to be of nature which can be covered by scope of section 9(1)(vii).

Facts

- The assessee was a manufacturer and exporter of leather goods. It filed return of income declaring certain taxable income.
- During assessment proceedings, the Assessing Officer noticed that the assessee had made remittances to a Germany based company, TUV GmbH, in respect of leather testing charges, but did not withhold the applicable taxes from those remittances.
- The assessee submitted that no testing operations were carried out by TUV GmbH in India, and that, accordingly, income could not be said to accrue or arise in India and, in such circumstances, assessee was not liable to deduct tax at source while making payments of testing charges.
- The Assessing Officer rejected assessee's explanation. He was of the view that payment in question amounted to fees for technical services within meaning of Explanation to section 9(1)(vii) and, thus, assessee was required to deduct tax at source under section 195 while making said payments.
- In view of failure of assessee to deduct tax at source, Assessing Officer disallowed payments of testing charges under section 40(a)(i).
- The Commissioner (Appeals) confirmed the order of Assessing Officer.
- On second appeal:

Held

- Coming to the merits of taxability of testing fees in the hands of TUV GmbH under section 9(1)(vii), the issue is covered against the assessee by decision of a coordinate bench, in the case of *Ashapura Minichem* (*supra*).
- As regards assessee's submission that the provisions of section 9(1)(vii) will not come into play in this case because the entire testing process is automated, it is well settled that when no human intervention is involved in any services, such services cannot be treated to be of the nature which can be covered by the scope of section 9(1)(vii).
- It is also undisputed that question is not of more or less of human involvement but the question of presence of or absence of human involvement.
- The ITAT observed that there is nothing on record to even demonstrate the precise process of leather testing, the actual steps involved in the process and parameters involved, nor these aspects of the matter have been examined by any of the authorities below.

- As regards assessee's submission that its source of income being outside India, the exception visualized in section 9(1)(vii)(b) will come into play, it is well settled that whether an India based business is one hundred per cent export oriented unit or not, it is still a business carried on in India, and it cannot, therefore, be covered by the first limb of exception envisaged in section 9(1)(vii)(b).
- Even if entire products are sold outside India, the fact of such export sales by itself does not make business having been carried outside India.
- Once the manufacturing facilities are outside India and the customers are also outside India, such a situation will indeed be covered by the exception visualized in section 9(1)(vii)(b), however, merely because the user of services is a one hundred per cent export unit, it cannot be said that the technical services are used "for the purpose of making or earning any income from any source outside India", and, accordingly, outside the ambit of income taxable as fees for technical services under section 9(1)(vii).
- The assessee submitted that the retrospective amendment was brought about by the Finance Act, 2010 which was nowhere in sight at the material point of time, *i.e.* assessment year 2008-09 and, in such a case the assessee could not be penalized for performing the impossible task of deducting tax at source in accordance with the law.
- In this regard, it was found that only as a result of the amendment in section 9(1), by the virtue of Finance Act, 2010, that the testing fees paid to the TUV GmbH could be said to be taxable in India.
- As for the earlier period, even though the amendment is said to be merely clarificatory in nature, in view of Supreme Court's judgment in the case of *Ishikwajima Harima Heavy Industries Ltd.* v. *DIT* (288 ITR 708) and in view of the fact that services were rendered outside India - even if utilized in India, the impugned leather testing fees was not taxable in India.
- This being the position, following the decision of coordinate bench in the case of *Channel Guide India Ltd.* v. *ACIT* 139 ITD 49, it is held that the disallowance under section 40(a)(i) cannot be invoked on the facts of this case.