

Payments for AMC and repair of machinery not FIS under India-US DTAA

Summary – The Mumbai ITAT in a recent case of VSNL Broad Band Ltd., (the Assessee) held that where a US company was paid annual maintenance charges (AMC) in connection with rendering annual maintenance services relating to an equipment sold to assessee, it was required to be considered whether so called AMC services rendered constituted 'included services' in sense of article 12(4)(a) to find out whether AMC payment constituted 'fees for included services'. Payment for repairs of machinery does not constitute 'fees for technical services'.

Facts

- The assessee, engaged in business of providing broadband services, purchased equipment, i.e., Dense Wave Multiplexing Equipment, from a US company, 'Sycamore'. It paid a sum as annual maintenance charge (AMC) to said US company in connection with said equipments without making TDS.
- The Assessing Officer held that payment towards AMC constituted 'fees for technical services' (FTS) and he, accordingly, disallowed said payment under section 40(a)(i).
- The Commissioner (Appeals) held that AMC payment did not constitute FTS as per Article 12(4)(b) of DTAA between India and USA and, therefore there was no need to deduct TDS thereon.
- On second appeal:

Held

- Sycamore, USA allows the assessee to reach them through the online/web-based processes developed and owned by it and on acquiring the equipment. The customers like the present assessee acquires the 'right to use' such processes of Sycamore. Commissioner (Appeals) has not gone into these issues, which he should have, when the assessee has chosen to opt for the treaty provision. Further, it is evident, the paragraph 5 of the article 12 enlists the list of services which do not amount to FIS. Thus, there is a need for analyzing if the services rendered to the assessee do not fall in sub-paragraphs (a) or (b) of article 12 of Indo-USA DTAA. It is the case of the Commissioner (Appeals), the impugned payments do not come under the 'make available' provisions *vide* sub-paragraph (b) of article 12(4) of the Treaty. But, it is a fact that Commissioner (Appeals) has not gone into the applicability of the provisions clause (a) of the article 12(4) of the Treaty.
- If the online facilities are available to the assessee through which technical troubles are sorted out by using such processes. There is no whisper about this 'processes' which should be done considering the nature of sub-clause (b) of article 12(4). Further there is no discussion about the applicability of the article 12(4)(a) which deals with ancillary and subsidiary services. As such, it is an undisputed fact that the assessee obtained purchased machinery and the payments were made in

accordance with the article 12(3) of the Treaty. The Tribunal does not have access to the relevant agreement for purchase of the machinery if the so called AMC services rendered constitute 'included services' in the sense of article 12(4)(a) of the Indo-USA DTAA.

- The Commissioner (Appeals) restricted his enquiry and adjudication inadequately to the provisions of article 12(4)(b) of the Treaty and left the issues to like 'processes' and further of course, he had not considered the provisions of article 12(4)(a) of the Treaty entirely. He completely ignored the fact that the service agreements have real genesis in the purchase agreement *qua* the equipment i.e. Dense Wave Division Multiplexing Equipment.
- The impugned service agreements, as amended from time to time, are required to be studied in conjunction with the purchase agreement of the equipment if the services which are rendered constitutes extended warranty with additional payments by way of AMC. Regarding the finding of the Commissioner (Appeals) on the applicability of the provisions of article 12(4)(b) of the Treaty, to the extent he adjudicated, the same do not need any interference subjected to the like finding of the Commissioner (Appeals) in the ensuing remand proceedings on if the 'processes' are not made available to the assessee and the online and web-based services do not constitutes making available to the assessee.
- As such, on perusal of the agreement between the assessee and Sycamore, USA in isolation, the said provisions do not imply the transfer of technical knowledge or skills to the assessee or to its employees. The subsequent service agreements are merely the 'automatic extension' and therefore, there is need for examining the applicability of the provisions of article 12(4)(a) if these services constitute 'ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received.'
- Otherwise, the annual maintenance charges paid by the assessee to the Sycamore Networks Inc., USA do not involve any deputation of its employees to the assessee for equipping them with the technical knowledge, technical skill etc. imparted by the Sycamore, USA. There is also no imparting of such knowledge as of technical nature for which assessee needs any rights of ownership or expertise. Therefore, from the point of view of the provisions of article 12(4)(b), it is a case of mere attending to the services by the Sycamore, USA to the complaints/troubleshooting of the assessee/assessee's customers through online requests. As such nothing is brought on record by the revenue to counter the findings of the Commissioner (Appeals) with regard to his conclusions on the applicability of the provisions of article 12(4)(b) to the extent analysed and adjudicated.
- Only for the limited purpose of examining the (i) applicability of article 12(4)(a); and (ii) the article 12(4)(a) to the extent of 'make available' of the processes' mentioned therein, the ITAT remanded the matter to the Commissioner (Appeals) for fresh examination and adjudication.