Taxability under the Act becomes irrelevant if income earned by NR isn't taxable in India as per DTAA

Summary – The Panaji ITAT in a recent case of Cedrick Jordan da Silva, (the Assessee) held where Where non-resident legal service provider had no PE in India and he stayed in India only for 22 days, in view of DTAA between India and Portugal, his income was not taxable in India.

Facts

- The assessee was engaged in the activity of collecting documents from the clients in India and sending it to a Portuguese concern of advocates in connection with Portuguese Nationality work undertaken by the Portuguese beneficiaries, who provided legal consultancy services in connection with the said Portuguese Nationality work and corresponded with Portuguese authorities in Portugal in this regard. The assessee collected and remitted fixed charges for different services from the clients in India as per the bills raised by him, in accordance with the agreement entered by him with Portuguese beneficiaries. This money was being transferred from assessee's proprietorship concern through HDFC Bank account to Portuguese beneficiaries on demand. The amount was sent without TDS on the basis of the certificate of Chartered Accountant.
- According to the Assessing Officer, the earnings received in the taxable territories on behalf of the non-resident were taxable under section 5(2) of the Income-tax Act and the assessee was liable to deduct TDS under section 195. He was of the view that it was covered under other income as enumerated under article 22 and, therefore, the assessee was liable to deduct TDS @ 30.9 per cent and accordingly, he imposed tax under section 201(1) amounting to Rs. 15,79,937 and levied interest under section 201(1A) amounting to Rs. 88,908.
- On appeal to the Commissioner (Appeals), the assessee contended that the income was not chargeable in India as the services were generated by professional outside India and rendered outside India for which payment was also received by them outside India through banking channels. The utility of the services was also outside India and, therefore, no income accrued in India. Reliance was also placed on article 14 of the DTAA between India and Portugal according to which the income derived by a person who is an individual or a firm of individuals (other than a company) who is resident of a Contracting State from the

performance in other Contracting State of professional services or other independent activities of a similar character shall be taxable only in the first mentioned State except in the circumstances which are given under clauses (a) and (b). According to the assessee, the case did not fall in the exception and the income was not chargeable to tax in India.

- However, the Commissioner (Appeals) upheld the order of the Assessing Officer.
- On appeal:

Held

- Section 195 of the Income-tax Act will apply only if the payment made to the non-resident has an element of income chargeable to tax in India. If there is a conflict between the provisions of the Income Tax Act and the DTAA entered by India with the other country, the provisions of the DTAA, if beneficial to the assessee, shall prevail.
- In this case, the legal consultancy services had been provided by the non-resident to which article 14 of the DTAA between India and Portugal are applicable. Article 14 clearly lays down that income derived by a person who is an individual or a firm of individuals (other than a company) who is resident of a Contracting State from the performance in other Contracting State of professional services or other independent activities of similar character shall be taxable only in the first mentioned State.
- It further states that such income may also be taxed in the other Contracting State under the following circumstances :

    - If such person has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities or;
    - If he is staying in the other State for a period or periods exceeding in the aggregate 183 days in any 12 months period commencing or ending in the fiscal year concerned.

  In that case, only so much of the income as is derived from his activities performed in the other State may be taxed in that State. The non-resident to whom the assessee has made the payment does not have any fixed base regularly available to him for performing his duty. Even he did not have any permanent establishment. That was not the case of the revenue.

- From the copy of the Passport also it was apparent that the person, to whom the assessee had made the payment was in India only for 22 days. She was not in India for a period

exceeding in the aggregate 183 days. Therefore, income derived from her activities performed in India could not be taxed in India.

- Even under article 15, the income could not be said to be taxable in India as under this article, a person has to be in the other State for a period or periods aggregating to 90 days in the relevant fiscal year. In the case of the person to whom the assessee made the payment, the person had remained in India only for 22 days. Therefore, this income could not be taxable.
- Further on going through the provisions of section 9(1)(vii), it was evident that even if the provisions of section 9(1)(vii) were applicable, due to the DTAA between India and Portugal if the income was not chargeable to tax, the DTAA will prevail and the income will not be chargeable to tax in India. Since the income is not chargeable to tax in India, the assessee was not under an obligation to deduct the TDS.
- Accordingly, the order of Commissioner (Appeals) holding the appellant liable to deduct tax at source as required under section 195 and thereby imposing tax under section 201(1) and interest under section 201(1A) was set aside.
- Consequently, the appeal filed by the assessee was allowed.