Services rendered outside India not taxable in India; ITAT ignores retro-amendment to sec. 9

Summary – The Mumbai ITAT in a recent case of New Bombay Park Hotel (P.) Ltd., (the Assessee) held that irrespective of insertion of Explanations 5 & 6, with retro effect from 1-6-1976, where entire services of providing technical design and drawings were rendered by foreign company to Indian assessee outside India, same would not be chargeable to tax in India.

Facts

- The assessee entered into an agreement with Project Orange, London to carry out work of designing etc. in three phases. The assessee did not deduct tax with regard to two phases on the ground that the technical designs and drawings which were prepared in London, were to be transported to India under both these phases. Under phase one Project Orange was to prepare project time schedule, scales, design report and other documents which were to be prepared in London. In phase two the technical design and drawings so prepared were to be transported to India and these were imported to India under Customs Regulations. According to assessee the payment made by it under phase one and two were not chargeable under Income-tax Act, 1961 as the same did not constitute income in the hands of the recipient. It was also the case of the assessee that non-resident to whom these payments had been made did not have any Permanent Establishment (PE) in India. However, TDS with respect to phase 3 had been deducted as well as deposited. In the alternative, it was the claim of the assessee that some of the payments made by the assessee were in the nature of reimbursement of the expenditure which could not be considered to be income of the non-resident.
- For non-deduction of tax the assessee had been held to be liable to pay a sum being tax required to be deducted and interest thereon under section 201(1A).
- On appeal, the Commissioner (Appeals) held that payment made by the assessee to the UK company was in the nature of fees for technical services within the meaning of Article 13(4)(c) of Indo UK Treaty and taxable in India. The assessee was liable to deduct tax at source under section 195. He had also rejected the claim of the assessee regarding reimbursement and upheld the liability of tax imposed by the Assessing Officer.
- In instant appeal, the assessee submitted that according to the decision of Supreme Court in the case of *Ishikawajima-Harima Heavy Industries* v. *DIT(IT)* [2007] 288 ITR 408/158 Taxman 259, the amount receivable by the foreign company in respect of off shore services in connection with the turnkey project executed in India did not fall within the purview of section 9(1)(vii) as the entire services were rendered outside India though utilized in India; further, assessee's PE had nothing to do with the services and, therefore, consideration received by the assessee in rendition of such services was not taxable in India. The assessee further submitted that on the basis of aforementioned decision, it was the case of the assessee that when entire services are rendered outside India in respect of phase one and two, the said amount was not chargeable to tax in India in the hands of the recipient company. Therefore, the assessee was not liable to deduct tax at source as according to section 195 tax deduction was required to be made only if the said amount is

chargeable to tax under Indian Income Tax Act. The assessee further submitted that so far as it related to amendment brought into the statute by Finance Act, 2012 with retrospective effect from 1/6/1976, even applying the same, the assessee could not be held liable for deduction of tax as per the decision of ITAT Mumbai in the case of *Channel Guide India Ltd.* v. *Asstt. CIT* [2012] 25 taxmann.com 25/139 ITD 49.

Held

- In view of decision of Supreme Court in the case of *Ishikawajima-Harima Heavy Industries* v. *DIT(IT)*[2007] 288 ITR 408/158 Taxman 259, it has to be held that if the entire services rendered by the foreign company to the assessee in respect of phase one and two outside India, then the same cannot become chargeable to tax in the hands of the foreign company in India. Unless the amount paid by the assessee-company to the foreign company does not become chargeable to tax in India then the question of applicability of section 195 does not arise. Therefore, without considering the amendment made by Finance Act, 2012 it has to be held that there was no liability of the assessee to deduct tax at source on the payment made by it with respect to work relating to phase one and two.
- Amendment by Finance Act, 2012 brought Explanations 5 and 6 into statute w.r.e.f 1-6-1976.
- The applicability of the amendment is also to be examined. Such issue is covered in favour of the assessee by the decision of the Tribunal in the case of *Channel Guide India Ltd.* v. *Asstt. CIT* [2012] 25 taxmann.com 25/139 ITD 49 (Mum.).
- The aforementioned amendment does not create any liability against the assessee as the legal position prevailing at the relevant time was to be considered. Accordingly, the assessee was not liable for deduction of tax under section 195.