Foreign Co. while acting as lead manager and underwriting ADRs was not rendering any technical service; no FTS

Summary – The Mumbai ITAT in a recent case of Merill Lynch International., (the Assessee) held that where assessee, a UK based company, acted as lead manager and underwriter to ADRs/GDRs issued by Indian companies abroad for raising capital, it did not 'make available' technical services to Indian companies within meaning of article 13 of India-UK DTAA and, thus, payments made for rendering said services were not taxable in India as 'fee for technical services'.

ORDER

The Revenue had raised the following grounds in this appeal:

"1. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in holding that the underwriting commission and reimbursement of expenses received by the assessee for issue of GDR/FCCB etc. from Indian companies is not taxable as fees for Technical Services under India-UK Treaty without considering the following facts:—

i. All receipts on account of issue of GDR & FCCB are in the nature of normal fund for the issuing company and it loses its special character of having been received outside India, once the same has been received by the issuing company and the issuing company can utilize for its own purpose.

ii. The ultimate benefit of the services rendered by the 0DB is ultimately with the issuing Indian Company and hence the services rendered have been ultimately been utilized in India and accordingly the said receipt is accruing or arising in India.

iii. The services of investment banking definitely fall within the definition of Fees for Technical Services (FTS) within the meaning of Income tax Act and hence is taxable in India.

iv. The 'make available' component is present with the receipt as in terms of latest Rulings in Perfetti Van Melle Holding B.V. in AAR No. 869 of 2010 dated 09.12.2011, the expression 'make available' would mean that the recipient of the service should derive an enduring benefit and would be in a position to derive benefit from similar service independent of the party rendering the services.

2. The Appellant prays that the order of the Ld. CIT(A) on the above ground(s) be set aside and that of the Assessing Officer restored."

The Ld. AR has pointed out that an identical issue has been considered and decided by this Tribunal is assessee's own case for the assessment year 2005-06 in ITA No. 2759/M/2009 vide order dated 30.8.2011 therefore, the issue is covered in favour of the assessee. On the other hand, The Ld. DR has relied upon the orders of the authorities below.

- After having considered the rival submissions and careful perusal of the record the HC noted that the assessee is a company incorporated under the laws of United Kingdom and operating as FII in India. The assessee also acts as lead manager and underwriter to the ADRs/GDRs issued by Indian companies abroad for raising capital. Since the assessee has undertaken investment banking transactions overseas in respect of which it had received certain amount from Indian companies, it was claimed by the assessee that the aforesaid activity carried on outside India and hence there is no income for such activities which is received or deemed to be received by the assessee in India. Thus the assessee contended before the AO the income from these transactions outside India does not fall within the scope of total income u/s 5 of the Act. Since it did not accrue or arise in India alternatively the assessee contended that the said income would not be taxable as per Article 13 of Indo-UK DTAA as the activity of rendering services do not satisfy the 'make available' clause. The AO did not accept the contention of the assessee and held that the services rendered by the assessee have been utilised in India, therefore, they are taxable as fees for technical services u/s 9(1)(vii) of the Act. On appeal, the CIT(A) decided the issue in favour of the assessee by following the order of this Tribunal is assessee's own case in assessment year 2005-06. We note that for the assessment year 2005-06 the Tribunal has decided this issue in para 6 as under:

- We have considered the rival submissions and perused the record as well as gone through the orders of the authorities below. We find that the issue under consideration is squarely covered by the decision of ITAT Mumbai Benches in the case of *Raymond Ltd.* v. *DCJT* (*supra*), wherein it was held that "neither management commission, nor underwriting commission nor even selling commission/concession would amount to fees for technical services within meaning of DTA with UK and, consequently, there was no obligation on part of assessee-company to deduct tax under section 195." The CIT(A) following the said decision held that the fee received by the assessee is not liable to tax in India as the same does not constitute fees for technical services under the India-UK DTAA read with the Memorandum of Understanding forming part of the India- USA DTAA as the technical services were not made available by the assessee to the Indian companies. Therefore, we find no infirmity in the findings of the CIT(A) and hence, the order of the CIT(A) is hereby upheld.'

- Following the earlier order of this Tribunal we do not find any error or illegality in the impugned order of the CIT(A). In the result, the appeal of the revenue was dismissed.