

Payment to foreign co. to conduct navigation studies at Indian port doesn't satisfy 'make available' clause; no FTS

Summary – The Ahmedabad ITAT in a recent case of Adani Port Infrastructure (P.) Ltd., (the Assessee) held that payment made by assessee to foreign company for navigation studies at Indian port to determine pre-existing conditions could not be ascribed as fee for technical services as per article 13 of Indo UK DTAA.

Facts

- The assessee had entered into an agreement with, a foreign company, (Wallingford) for morphological studies, sedimentation assessment, navigation and mooring assessment in respect of a port.
- The assessee made payment to Wallingford in respect of said reports.
- It was noted by Assessing Officer that no tax was deducted while making the said payment.
- In response, the assessee submitted that the said fees were not in the nature of 'making available' of technical knowledge to the assessee as per article 13 of DTAA between India and UK.
- However, the Assessing Officer opined that services provided by Wallingford were nothing but fees for sedimentation studies, which were in nature of fees for technical services as defined in *Explanation 2* section 9(1)(vii) and computed tax liability and interest thereon under section 201(1A).
- The Commissioner (Appeals) noted that the Assessing Officer had ignored the fact that the assessee-company was supposed to receive only a Report on the pre-existing conditions which contained data and information about the morphological studies, navigation studies, etc. in relation to the Port whereby no technical knowledge, skill, know-how, etc. was made available to the assessee and held that in terms of article 13(4)(c) of the India UK DTAA, the fees paid by the assessee company were not fees for technical services. Consequently, the assessee company would not be liable to withholding tax under section 195(1).
- On appeal:

Held

- The reason for asking a report in respect of the Port was that as per previous studies undertaken it was noticed that there were strong tidal action and occasional cyclone activity. The Morphological activity at the site causes rapid coastal erosion; and therefore, a survey is required to be undertaken to investigate all those aspects. The assessee has therefore requested to give the report in two phases.
- The reports were in the form of preliminary assessment as claimed by the assessee; therefore, the result of the survey was required to be projected in Tabular and Graphical form. Wherever it was

appropriate, a design in the terminal with proper analysis was also required to be provided by the service provider. There was a clause of confidentiality and the know-how. In the agreement it is provided that the report so prepared by Wallingford would not be transferable by the assessee. The assessee company shall not use the know-how in performing services for any other client in future. Even the assessee company was not entitled to sub-license any of the rights granted in the report.

- As per Article 13 of Indo-UK DTAA which says that 'royalty' and 'fees for technical services' arising in a contract State and paid to a resident of other contracting State may be taxed in that Other State if it is made available to the recipient.
- There are significant distinction between the definition as prescribed under section 9 of "fees for technical services" as compared with the definition prescribed in article 13 of Indo-UK treaty. But the settled law is that the provisions of DTAA overrides the provisions of IT Act in the matter of ascertainment of taxability under the Income tax Act.
- After considering the facts and circumstances of the case as discussed at length hereinabove, it was to be held that the fees for technical services was not paid for making available the technical knowledge, experience, and know-how to the assessee. Therefore, the payment made by the assessee to the said resident is out of the ambit of the provisions of section 195. The view taken by Commissioner (Appeals) is hereby confirmed.