Sum received by assessee towards sharing of global telecommunication facility with NR agents wasn't FTS

Summary – The Mumbai ITAT in a recent case of Aktieselskabet Dampskibsselskabet Svendborg, (the Assessee) held that amount received by assessee towards shared IT Global Portfolio Tracking system from its agents could not be added as fee for technical service to assessee's income.

ORDER

The Revenue preferred the appeal against the order of ld. CIT(A) -10, Mumbai dated 29-09-2011 and the grounds raised by the Revenue therein read as under:—

"1. On the facts and in the circumstances of the case and in law, the ld. CIT(A) has erred in holding that the reassessment proceedings are not valid as it could not be said that there was escapement of income, whereas, what is only required at the time of reopening the proceedings is to have 'reason to believe' that income had escaped and this 'reason to believe' was very much there at the time of reopening of assessment.

On the facts and in the circumstances of the case and in law, the ld. CIT(A) has erred in not holding that payments received by the assessee are in the nature of Royalty or fees for technical services as per section 9(1)(vi) & (vii) of the I.T. Act as well as per Article 13(4) of DTAA."

2. We will first deal with the question as to whether the receipt in question can be said to be FTS. The definition of FTS both under the DTAA as well as under Expln.-2 to Sec.9(1)(vii) of the Act has already been referred to earlier. The substance of the definition is that it refers to a payment in consideration for the services of managerial, technical or consultancy nature. But it should not be a payment to an employee of the person making payment. In that case it would become salary. Two things are thus clear, viz, (i) That there should be an agreement to engage/utilise technical service and a person undertaking to render them; (ii) If there is a contract of employment and the employee renders technical service under a contract of employment then the payment of remuneration for such services are outside the purview of "fees for technical services".

3. The Assessee maintained a global telecommunication facility, capable of supporting communication facility between itself and its agents in various countries. The above facility run on a combination of mainframe and non-mainframe servers located at Denmark. These systems are an integral part of international shipping business. The systems comprise of booking and communication software, hardware and data communication network. it enables co-ordination of cargoes and ports of call for the Assessee fleet. The expenses incurred by the Assessee are in respect of systems mainly include network costs, data communication, data production, data processing costs etc. Without these systems the

international shipping business cannot be conducted nor would the agents of the Assessee across the work be able to discharge their role as agents of the Assessee. This facility enables its agents across the world to access several information like tracking of cargo of a customer, transportation schedule, customer information, documentation system and several other information which we have already set out in the earlier part of this order. The cost for setting up this global telecommunication facility is shared between the Assessee and its agents across the world. We have already seen the relevant clause in the agreement between the Assessee and the agent and a reference to the rate sheet attached to the agency agreement. In respect of such cost sharing the Assessee has raised invoice on its agents MTL, MLIL, SIPL. The Assessee's Chartered Accountants at Denmark, M/S. KPMG have duly certified the basis of cost sharing between the Assessee and have opined that it was only reimbursement of cost and no profit element is involved in the use of the facility by the Agents for facility provided by the Assessee. The Assessee has also given a declaration that there is no mark up to the costs and only actual costs are recovered. All the above documents have been totally disregarded by the CIT(A). There is no finding by the AO or CIT(A) that there was a profit element embedded in the payments received from the Assessee from its agents in India.

4. The learned counsel for the Assessee has placed reliance on the decision of the Hon'ble Madras High Court in the case of *Skycell Communications Ltd*. 251 ITR 53 (Mad). In the aforesaid case the Hon'ble Court had an occasion to examine the definition of "fee for technical services" in the context of payment of fees by a cellular/Mobile phone subscriber to the operator of the cellular/mobile phone facility. The following were its observations:

Thus while stating that "technical service would include managerial and consultancy service, the Legislature has not set out with precision as to what would constitute "technical" service to render it "technical service". The meaning of the word "technical" as given in the New Oxford Dictionary is adjective 1. of or relating to a particular subject, art or craft or its techniques : technical terms (especially of a book or article) requiring special knowledge to be understood a technical report. 2. of involving, or concerned with applied and industrial sciences : an important technical achievement. 3. resulting from mechanical failure a technical fault. 4. according to a strict application or interpretation of the law or the rules the arrest was a technical violation of the treaty.

Having regard to the fact that the term is required to be understood in the context in which it is used, "fee for technical services" could only be meant to cover such things technical as are capable of being provided by way of service for a fee. The popular meaning associated with "technical" is "involving or concerning applied and industrial science".

In the modem day world, almost every facet of one's life is linked to science and technology inasmuch as numerous things used or relied upon in everyday life is the result of scientific and technological development. Every instrument or gadget that is used to make life easier is the result of scientific

invention or development and involves the use of technology. On that score, every provider of every instrument or facility used by a person cannot be regarded as providing technical service.

When a person hires a taxi to move from one place to another, he uses a product of science and technology, viz., an automobile. It cannot on that ground be said that the taxi driver who controls the vehicle, and monitors its movement is rendering a technical service to the person who uses the automobile. Similarly, when a person travels by train or in an aeroplane, it cannot be said that the railways or airlines is rendering a technical service to the passenger and, therefore, the passenger is under an obligation to deduct tax at source on the payments made to the railway or the airline for having used it for travelling from one destination to another. When a person travels by bus, it cannot be said that the undertaking which owns the bus service is rendering technical service to the passenger and, therefore, the passenger must deduct tax at source on the payment made to the bus service provider, for having used the bus. The electricity supplied to a consumer cannot, on the ground that generators are used to generate electricity, transmission lines to carry the power, transformers to regulate the flow of current, meters to measure the consumption, be regarded as amounting to provision of technical services to the consumer resulting in the consumer having to deduct tax at source on the payment made for the power consumed and remit the same to the Revenue.'

The Court finally concluded as follows:

'Installation and operation of sophisticated equipments with a view to earn income by allowing customers to avail of the benefit of the user of such equipment does not result in the provision of technical service to the customer for a fee.

When a person decides to subscribe to a cellular telephone service in order to have the facility of being able to communicate with others, he does not contract to receive a technical service. What he does agree to is to pay for the use of the airtime for which he pays a charge. The fact that the telephone service provider has installed sophisticated technical equipment in the exchange to ensure connectivity to its subscriber, does not on that score, make it provision of a technical service to the subscriber. The subscriber is not concerned with the complexity of the equipment installed in the exchange, or the location of the base station. All that he wants is the facility of using the telephone when he wishes to, and being able to get connected to the person at the number to which he desires to be connected. What applies to cellular mobile telephone is also applicable in fixed telephone service. Neither service can be regarded as "technical service" for the purpose of section 194J of the Act……..

…….At the time the income-tax Act was enacted in the year 1961, as also at the time when Explanation 2 to section 9(l)(vii) was introduced by the Finance (No. 2) Act, with effect from April 1, 1977, the products of technology had not been in such wide use as they are today. Any construction of the provisions of the Act must be in the background of the realities of day-to-day life in which the products of technology play an important role in making life smoother and more convenient. Section 1

94J, as also Explanation 2 in section 9(1)(vii) of the Act were not intended to cover the charges paid by the average house-holder or consumer for utilising the products of modem technology, such as, use of the telephone fixed or mobile, the cable 'F,V., the internet, the automobile, the railway, the aeroplane, consumption of electrical energy, etc. Such facilities which when used by individuals are not capable of being regarded as technical service cannot become SO when used by firms and companies. The facility remains the same whoever the subscriber may be - individual, firm or company.

"Technical service" referred in section 9(1)(vii) contemplates rendering of a "service" to the payer of the fee. Mere collection of a "fee" for use of a standard facility provided to all those willing to pay for it does not amount to the fee having been received for technical services.

5. The payments received by the Assessee are for providing a facility to its agents. The payment received is nothing but a payment by way of reimbursement of the cost for providing a particular facility. The Assessee is in the business of shipping and not in the business of providing any technical service. We are of the view that this ratio of Hon'ble Madras High court will apply to the facts of the present case. The Assessing Officer in coming to the conclusion that the payment was for fee for technical services has relied on the fact that there has been use of sophisticated equipments. This by itself will not be sufficient to holding technical services being rendered. All the above features enables better and efficient conduct of business. It is due to improved technology. That does not mean that the Assessee is providing technical services. The Assessee as well as its agents are the beneficiaries of such improved technology. The Assessee is not the owner of any technology to provide them for a fee to prospective user. They are themselves consumers of the technology.

6. The learned counsel for the Assessee has relied on the decision in the case of *CIT* v. *Bharati Cellular Ltd.,* 319 ITR 139 (Del) wherein the Hon'ble Delhi High Court had taken the view that to call a payment as fee for technical service, the payment should be for use of human skills and where only machines perform or give some services that would not be enough to call a payment a payment for FTS. The learned DR. submitted that the basic data is entered by human effort and therefore the payment should be treated as FTS. We are of the view that the argument of the learned D.R. cannot be accepted because ultimately the machine only performs and no human element is involved. The learned D.R. also submitted that the huge cost for installation of the system and the huge payment made by the Assessee by itself is an indication that the payment is FTS. In this regard we notice that the percentage of payment received by the Assessee towards reimbursement compared to the total receipts in the form of freight etc., from shipping business in India is less than 1%. Thus the plea of the learned D.R. in this regard is without any merit. We therefore hold that the receipt in question cannot be considered as Fees for Technical services rendered.'

7. Following the order dated 11-6-2010 (*supra*) passed in the case of Dampskibsselskabet af 1912 Aktiesselskab, the Tribunal has also deleted a similar addition made by the A.O. on account of amount received towards shared IT Global Portfolio Tracking System in the assessment originally completed u/s

143(3) of the Act in the case of the assessee for A.Y. 2002-03 as well as 2003-04. Respectfully following these orders of the Tribunal on a similar issue, we uphold the impugned order of the ld. CIT(A) deleting the addition made by the A.O. on account of amount received by the assessee towards shared IT Global Portfolio Tracking System by treating the same as fees for technical services and dismiss ground No. 2 of the Revenue's appeal.

8. Keeping in view our decision rendered on the issue raised in ground No. 2 upholding the order of the ld. CIT(A) deleting the addition of Rs. 7,49,84,869/- made by the A.O. on account of amount received by the assessee towards shared IT Global Portfolio tracking System, the issue raised in ground No. 1 relating to the validity of assessment made by the A.O. u/s 143(3) r.w.s. 147 of the Act has become infructuous or academic. We therefore do not consider it necessary or expedient to adjudicate upon the same.

9. In the result, appeal of the Revenue is dismissed as indicated above.