

Sum paid to check design/quality of Fire protection system wasn't 'FTS' as it didn't satisfy make available clause

Summary – The High Court of Karnataka in a recent case of Nokia India (P.) Ltd., (the Assessee) held that where Finnish enterprise merely provided services to assessee-Indian company to ensure that HV AC, Electrical and Fire Protection systems to be installed by contractor at assessee's factory were of suitable design and quality, such services did not 'make available' any technical knowledge, skill or experience assessee nor was it consisted of development and transfer of a technical plan or technical design to assessee; thus, payments made to Finnish enterprise did not constitute FTS

Where services were performed by Finnish enterprise primarily from outside India and its employees made intermittent visits to India only for purpose of attending meetings with assessee, it could not be said that Finnish enterprise had a PE in India; thus, payments received by Finnish enterprise from assessee for providing of services were not liable to taxation in India

Facts

- During the year under consideration, respondent-assessee company i.e., Nokia India was in the process of setting up a manufacturing facility at Chennai. For this purpose, the contract for design, manufacturing and completion for the manufacturing facilities was given to Leighton Contractors India Pvt. Ltd. Olof Granlund Oy was a company incorporated in Finland and was engaged in the business of providing consulting services in relation to HVAC, electrical and fire protection systems and this company was engaged by the respondent-assessee company for the purpose of reviewing the design, construction plans prepared by the Leighton Contractors India Pvt. Ltd. This was to ensure that Nokia's global standards for the manufacturing facility are met. These services are rendered outside India only.
- In consideration for the services rendered during the year under consideration the respondent-assessee company paid Euro 2,208421 (Rs. 11,869,359 approx) to Olof Granlund . Since the respondent assessee company took a view that the said payments are not liable to taxation in India under the provision of Double Taxation Avoidance Agreement entered between India and Finland. No taxes were withheld by the respondent- assessee company on said payments.
- The Revenue held the assessee liable for nondeduction of tax at source under section 195

Held

- Finnish enterprise Olof Granlund merely provided services to ensure that the HV AC, Electrical and Fire Protection systems to be installed at the respondent's factory in Chennai are of the right design and quality. The scope of work performed by Olof Granlund clearly lays down that Olof Granlund shall be responsible for providing following quality and design control services to the appellant:

- (a • • Review of systems description, diagrams, cost estimates, building designs etc;
)
- (b • • Review of preliminary system design and quality control;
)
- (c) • • Review of equipment list/. selections, layout proposals, conducting inspections etc; and
- (d • • Holding meetings in India and Finland, in connection with the above.
)
- As is evident from the above, Olof Granlund's services to the respondent were not driven towards imparting any technical knowledge or experience to the appellant that could be used by the respondent independently in its business and without recourse to Olof Granlund. These services were neither geared to nor did they 'make available' any technical knowledge, skill or experience to the respondent or consisted of development and transfer of a technical plan or technical design to the appellant. Given that the term 'make available' envisages a situation where the service recipient (i.e the respondent) is able to make use of the technical knowledge inherent in the services provided to him independently in his business or for his own benefit and without recourse to the service provider (i.e Olof Granlund), payments made by the respondent to Olof Granlund for provision of above services do not constitute FTS under narrower provisions of Article 13 of the India- Finland tax treaty. Further, the services rendered by Olof Granlund are restricted to the review of design, drawings, cost estimates etc prepared/ developed by the contractor of the assessee, to check whether the same are as per Nokia group's standard. Olof Granlund 'as not responsible for preparation of any design, diagram etc for the appellant and accordingly the services provided by it does not involve development and transfer of technical plan or design.
- Accordingly, the payments made by the respondent to Olof Granlund do not qualify as FTS under the provisions of India- Finland tax treaty.
- Further, as per the provisions of India-Finland tax treaty, where the service do not qualify as FTS, Article 13 would not be applicable to the Finnish enterprise and its taxability would need to be examined as per Article 7 (read with Article 5) of the India-Finland tax treaty.
- As per Article 7(1) of the tax treaty, 'Business Profits' earned by a Finnish Enterprise is taxable in India only if that Finnish enterprise carries on business in India through a PE in India. The term PE has been defined in Article 5 of the India-Finland tax treaty to include a branch, office, factory, workshop, etc of the Finnish enterprise in India. Where the Finnish enterprise does not have a PE in India under the provisions of Article 5 of the India-Finland treaty, no portion of the income from services provided to a customer in India are liable to taxation in India.
- In the instant case, admittedly Olof Granlund did not have any office/ place of business in India. Further, the services were performed by Olof Granlund primarily from outside India and its

employees made intermittent visits to India only for the purpose of attending meetings with the respondent.

- Accordingly, Olof Granlund Oy did not have a PE in India under the provisions of Article 5 of the India-Finland tax treaty during the subject period. Certificate obtained by the respondent from Olof Granlund in this regard is on record.
- In light of the above, the payments received by Olof Granlund from the respondent for provision of services are not liable to taxation in India under the narrower provisions of the India-Finland tax treaty.
- When the payment made by respondent-assessee is not taxable under the provisions of Income Tax Act 1961, the assessee is no more required to deduct the tax at source on such payments under section 195. The issue is no more res integra and covered by the decision of the Supreme Court in the case of GE India Technology Centre P. Ltd. Vs. CIT and another 327 ITR 456 (SC) wherein the Supreme Court held that if payment is not assessable to tax there is no question of tax at source being deducted.