

## Payment made to foreign service providers towards international toll free services is 'FTS'

**Summary – The Chennai ITAT in a recent case of Conference Call Services India (P.) Ltd., (the Assessee) held that where assessee, engaged in providing audio, video and web conferencing services, made payments to foreign service providers towards international toll free services, said payments being in nature of fee for technical services, required deduction of tax at source**

**Direction issued by DRP to Assessing Officer to examine issue afresh as to whether management fee paid by assessee to its group companies located abroad was taxable as 'fee for technical services' in light of relevant DTAA, did not require any interference**

### Facts - I

- The assessee was engaged in the business of providing audio, video and web conferencing services to various customers across the globe.
- During relevant year, assessee paid certain amount to foreign service providers towards international toll free services.
- The assessee claimed that it was not a case of payment for technical services and therefore tax was not required to be withheld on those payments.
- The revenue authorities took a view that payments were made by assessee to international toll free service providers to enable its clients outside India to access its services. It therefore, fell squarely under the ambit of section 195 and therefore, payments made without deducting tax and remitting the same would not qualify as expenditure under section 40(a)(i).
- The revenue authorities further opined that in absence of any application filed by assessee under section 195(2) or 195(3), payment in question was to be subjected to tax.
- On appeal:

### Held - I

- A similar issue was considered by the Tribunal in the case of *Frontier Offshore Exploration (India) Ltd. v. Dy. CIT* [2009] 118 ITD 494 (Chennai). The Tribunal held that provisions of section 195 clearly show that any person responsible for Making payment to a non-resident in respect of any interest or any other sum chargeable under the provisions of this Act has to deduct tax at the rates in force.
- The Tribunal further held that assessee is to come before the revenue authorities in the form of application under section 195(2) and make a claim that only a particular proportion is chargeable and the appropriateness of the same is to be decided by the Assessing Officer and only after that, such sum is to be determined. This clearly shows the requirement of application of mind by the taxing authorities and, therefore, this sum cannot be decided by the payer of such sum, whatever

may be the circumstances. If such appropriate proportion was to be decided by the payer or the assessee, then section 195(2) will become redundant.

- Following the aforesaid order, it is held that assessee is liable to deduct TDS for payment made to foreign service provider. However, if there is short deduction of TDS then the payment cannot be disallowed as short deduction is different from no deduction of TDS. Accordingly, the Assessing Officer is directed to segregate the short deduction and no deduction of TDS on the payments made to foreign provider and he has to disallow only payment where there is no deduction of TDS. Accordingly, this ground is partly allowed.

#### Facts - II

- During the year under consideration, the assessee-company paid management fees to its group companies abroad. The assessee claimed that such services were not taxable under the relevant tax treaty as the same had not satisfied the 'make available' test.
- The Assessing Officer opined that as per *Explanation (2)* to section 9(1)(vii), fee for technical services means any consideration for rendering of any managerial, technical or consultancy services. Therefore, the management fees paid by the assessee to the non-resident fell within the definition of fee for technical services as provided in *Explanation 2* to section 9(1)(vii).
- The DRP did not record its findings on the issue in dispute rather the DRP directed the Assessing Officer to examine the issue with reference to relevant DTAA and then make disallowance if required.
- On appeal:

#### Held - II

- The DRP has not given any findings and only given direction to the Assessing Officer to examine the entire issue afresh in the light of DTAA and to decide thereupon. Being so, at this stage the Tribunal is not in a position to express any opinion on the findings of the DRP. This issue is required to be properly examined by the Assessing Officer with reference to the relevant DTAA. Accordingly the findings of the DRP is confirmed.