# Consultancy services provided by foreign Co. in relation to highway projects in India won't be treated as 'FTS'

**Summary – The Delhi ITAT in a recent case of MSV International Inc, Gurgaon., (the Assessee) held that where foreign company provided consultancy for highway projects in India, it would not amount to technical service as it was related to construction activity and thus it would not be subjected to presumptive taxation under section 44D but would be taxed as regular business profit**

**Facts**

- The assessee, a company incorporated in USA, provided consultancy services to its clients in India for various projects. It declared its profit by applying regular method of taxation, *i.e.*, deducted expenses from incomes.
- The Assessing Officer taxed receipts from highway projects of the assessee through presumptive taxation under section 44D on ground that (*a*) the assessee received fees for technical services and (*b*) as per article 12(4) of the Indo-USA DTAA, consultancy services provided by the assessee were made available to the clients in India and hence taxable in India.
- The Commissioner (Appeals) negated order of the Assessing Officer by holding that receipts of the assessee were related to construction activity and thus were covered by the exclusion provided in the definition of fees for technical services and therefore same could not be taxed as fees for technical services.
- On appeal before the Tribunal:

**Held**

***Scope of work undertaken by assessee was not of technical service***

- Assessing officer has merely gone on the presumption that as:—

  (a) The contracts receipts are for the consultancy services it is covered in the definition of fees for technical services.
  (b) He has also been lead by the classification of receipt in the TDS certificates where the deduction has been made under section 194J as consultancy fees.
  (c) Assessee itself says in return of income that it is engaged in the business of consultancy.

For the purposes of the characterization of the income of the assessee all the above criteria are not relevant for the reason that:—

(1) The consultancy services are in general, 'fees for technical services'. But Assessing Officer need to examine it with respect to *explanation* (2) of section 9(1)(*vii*) which has also provided some

exclusions. Assessing Officer has failed to look in to those exceptions carved out in the right perspective.

(2) The section mentioned in TDS certificate and the disclosure in the return of income cannot determine whether the consultancy services are in the nature of fees for technical services or otherwise. Therefore it is also not determinative of the nature of receipts.

- For determining the nature of receipt, it is imperative to examine the scope of the work to be carried out by the assessee which is extracted in order of the Commissioner (Appeals).
- Assessee is engaged in the consultancy services but that is also the business of the assessee being carried on in India. This fact is apparent that Assessing Officer himself has taxed certain amount as business income of the assessee. Act of providing services to the various clients in India is in fact the business of the assessee. This fact has also been admitted by Assessing Officer in assessment order. Assessing Officer has made irrelevant analysis of disclosure in the return of income of the assessee as well as the nomenclature described in TDS certificate, when Assessing Officer himself agrees that assessee is engaged in the business of services with reference to highways, transport, etc. Therefore, it cannot be said that assessee is not carrying any business in India.
- According to *Explanation 2* to section 9(1)*(vii)*, any consideration which is for the rendering of any managerial, technical or consultancy services is characterized as 'fees for technical services' ('FTS'). However some exceptions are carved out, if such managerial technical or consultancy consideration is for any construction etc. or like projects undertaken by the recipient. Assessing Officer has failed to consider this exceptions carved out in definition of FTS, therefore the attempt made by Assessing Officer is on incomplete reading of that explanation ignoring exceptions. Hence, it is necessary to examine the nature of work carried out by the assessee. From the nature of work carried out by the assessee it is apparent that it has got the consultancy work related to laying down of roads etc. which is for construction activity or like project.
- Assessing Officer has held that as assessee is rendering services with respect to various projects and therefore all the services are rendered by the assessee are of technical in nature. Undenyingly the services rendered by the assessee are technical in nature but merely because the services are technical in nature they does not become fees for technical services in accordance with the provision of *Explanation* 2 to section 9(1)(vii). This technical service needs further examination whether they fall in the exception carved out therein or not. The services do fall in the exceptions carved as construction activity and like projects.
- Assessing Officer has rejected the contention of the assessee holding that the case of the assessee does not fall within the exception. Bereft of any reasoning that why the services rendered with reference to construction of roads is not a construction activity or like projects. Revenue could not point out any other judicial precedents against the assessee and also could not controvert the decision of co-ordinate bench in *Agland Investment Services Inc.* v. *ITO* [1985] 22 Taxman 9 (Delhi - Trib.) wherein it was held that 'construction' includes engineering and bid evaluation.

- Provision of section 44D provides special treatment of fees of technical services to be charged at gross presumptive rates and expenses incurred there on are not allowed as deduction. For invoking section 44D, the fees for technical services should have the same meaning as per *Explanation 2* to section 9(1)*(vii)*. As it is already held that receipt of assessee is not 'fees for technical services' as defined under above explanation as it relates to construction activity, accordingly that receipt is out of the purview of presumptive taxability under section 44D.

***Services provided by assessee did not satisfy criteria to be construed as 'make available' to recipient***

- It is hard to understand how in this consultancy work the technology is made available to recipient of service who would be able to utilize the knowledge or know-how in future on his own without the aid of service provided. Assessee is providing the services in relation to technical advice as set out in earlier paragraphs. The averment of Assessing Officer that it is 'made available' to assessee is not correct and therefore it is disregarded. The term 'make available' has been explained by Karnataka High court in case of *CIT* v. *De beers India (P.) Ltd.* [2012] 346 ITR 467/208 Taxman 406/21 taxmann.com 214 on Indo-Netherland DTAA that the technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. Technology will be considered 'made available' when the person acquiring the service is enabled to apply the technology.
- It's not the case of the Assessing Officer that there is imparting of technical skill which is absorbed by the recipient of service so that the recipient can deploy the similar technology in future without depending on the provider. In view of above, these payments do not qualify under article 12(4) of the DTAA as the conditions of 'make available' does not satisfy.
- There is no infirmity pointed out by the revenue in the findings of Commissioner (Appeals) regarding applicability of article 7 of the DTAA regarding taxability of the sum and its consequent taxability under section 44D.
- It is also not controverted that assessee was carrying on similar activities in the preceding years as well, and the income earned form the said activities have been accepted by the department as business income of the assessee and assessment made under section 143(3). Principle of consistency has been accepted by the Courts in many judicial precedents and some of the landmark decisions. Therefore on this ground too assessee deserves relief.
- In view of above, according to the provision of section 44D, read with section 9(1)(vii) assessee's receipt from highway project is not taxable as fee for technical services under that section but under normal provision of income-tax act as business income.