

Placement agency services couldn't be treated as 'FTS' under article 12 of India-US DTAA

Summary – The Mumbai ITAT in a recent case of Lehman Brothers & Advisors (P.) Ltd., (the Assessee) held that Services in nature of recruitment or placement agency do not come under purview of 'fees for included services' within meaning of article 12(4)(b) of DTAA between India and U.S.A.

Facts

- The assessee-company entered into agreement with the foreign entities to undertake search process for recruiting employees on its behalf and reimbursed expenses incurred by them. It submitted that expense was paid at cost price and there was no markup.
- The Assessing Officer opined that it had not deducted tax at source with regard to such payments. He observed that payments made by the assessee were in nature of the Technical/Managerial services and, that the assessee was liable to deduct tax as per the provisions of section 195(1), read with section 9(1)(vii).
- On appeal, the assessee had submitted all relevant documents.
- The first appellate authority held that (FAA) the assessee had submitted employee-wise recruitment charges incurred during the year along with the supporting documents, and the remaining expenses were towards communication expenses, legal & professional charges, printing & station repairs/maintenance cost and all these expenses were reimbursement only and were not in the nature of FTS, moreover, there was no element of income/profit embedded in such payments.
- Finally, he held that the disallowance made by the Assessing Officer by invoking provisions of section 40(a)(i) was not sustainable.
- On appeal:

Held

- The auditor had not qualified the disputed amount as disallowance under section 40(a)(i). The Assessing Officer had not provided that profit element was embedded in the payments made to the overseas entities. The payment was pure and simple reimbursement, and provisions of section 195 were not attracted to reimbursements.
- The FAA has rightly held that section 40(a)(i) had no role to play regarding the payments made by the assessee to overseas companies, Secondly, services in the nature of recruitment or placement agency do not come under the purview of 'fees for included services' within the meaning of article 12(4)(b) of the DTAA. The retrospective amendment to section 9 cannot change the tax withholding liability with retrospective effect. The assessee had acted as per the provisions of Act that were applicable at the time of making the payment and in the case under consideration, there was no liability on part of the assessee to deduct tax for the payment made. Considering the above, the order of the FAA does not suffer from any legal or factual infirmity.