FTS paid to NR was taxable in India as payer's source of income from such services was in India

Summary – The Chennai ITAT in a recent case of Alstom T & D India Ltd., (the Assessee) held that In order to fall within second exception provided in section 9(1)(vii)(b), source of income, and not receipt should be situated outside India

Facts

- The assessee-company had developed Gas Circuit Breakers and Vacuum Circuit Breakers and the said development would be complete only after the design tests as specified in the IEC standards were satisfied. KEMA, and CESI were internationally recognised testing agencies to carry out these design tests for the electrical engineering industry. The assessee-company had entered into contract with KEMA and CESI to conduct various types of tests to these Circuit Breakers that was mandatory.

The assessee had paid towards testing charges

- The Assessing Officer had observed that the assessee had not deducted TDS under section 195 from said payment and therefore, he disallowed the same and added to the total income of the assessee.
- The Commissioner (Appeals) mainly by following the decision of the Tribunal in the case of *Havells India Ltd.* v. *Addl. CIT* [2011] 13 taxmann.com 64/47 SOT 61 (URO), observed that the assessee's case was squarely covered by the exception provided in clause (*b*) of section 9(1)(*vii*) and it held that no income had accrued or arisen in India on these transactions and, therefore, TDS was not deductible.
- On appeal:

Held

- Against the said decision of the Tribunal, the department has preferred an appeal before the Delhi High Court and the High Court in the case of *CIT* v. *Havells India Ltd.* [IT Appeal No.55 of 2012 dated 21-5-2012], has given an elaborate observation and findings and decided the issue against the assessee.
- In the instant case, it is a fact that the export contracts were concluded in India and the assessee's products were sent outside India. Further the manufacturing activity of the assessee also located in India. Source of income was created at the moment when the export contracts were concluded in India. Even though the importer of the assessee's products is situated outside India, he is only the source of the monies received and he cannot be regarded as a source of income. In order to fall within the second exception provided in section 9(1)(*vii*)(*b*), the source of the income, and not the receipt should be situated outside India and this condition is not satisfied in the present case.
- The assessee's case does not even fall under the first exception, since in order to get the benefit of the first exception it is not sufficient for the assessee to prove that the technical services were not

utilised for its business activities of production in India, but it is further necessary for the assessee to show that the technical services were utilised in a business carried on outside India.

- The meaning of the term source of income in section 9(1)(*vi*)/(*vii*) has been a subject matter of dispute since over sometime. In keeping with few other judicial precedents, the Delhi High Court has laid down that it is not the payer of income but the location of the manufacturing activity and concluding of the export contract from India that will determine the source of income. Further the assessee needs to specifically demonstrate that the technical services were utilised in a business carried on outside India in order to fall under the exception.
- Accordingly, respectfully following the decision of the Delhi High Court, it is held that the on the FTS paid to KEMA Netherlands and CESI, Italy, TDS is, therefore, deductible under section 195 and the Assessing Officer had rightly invoked provisions of section 40(*a*)(*i*) and made disallowance.