

Payment for bio-analytical services provided by foreign Cos couldn't be held as 'FTS' under India-USA treaty

Summary – The Ahmedabad ITAT in a recent case of B.A. Research India (P.) Ltd., (the Assessee) held that where non-resident companies located in USA rendered bio-analytical services on samples provided by assessee, since there was nothing on record suggesting that services rendered to assessee were made available to it and assessee was able to apply same on its own, said services would not fall within purview of 'included services' under article 12(4)(b)

Facts

- During relevant year, non-resident companies located in USA and Canada rendered bio-analytical services on samples provided by assessee.
- The Assessing Officer held that the payments made to non-resident parties were taxable in India both as per provision of the Act and the tax treaty between India and USA and India-Canada.
- Since the assessee did not deduct tax at source while making payments in question, the Assessing Officer disallowed said payments.
- The Commissioner (Appeals) held that the services provided to the assessee by the non-resident parties of USA and Canada did not fall within the purview of 'included services' under article 12(4)(b) of DTAA and, thus, there was no liability on the assessee to deduct TDS under section 195 of the Act, while making payment for such bio-analytical services rendered to it. He thus deleted disallowance made by the Assessing Officer.
- On revenue's appeal:

Held

- There is no dispute with regard to the fact that under the contract, the non-resident entity has carried out bio-analytical services on the sample supplied by the sponsor and submitted its report on the bio-analysis of the tablets studies. The said services have been performed outside India. The non-entities have no permanent establishment in India. It is the contention of the assessee that the services so rendered are not made available to the assessee.
- The Commissioner (Appeals) has given a finding on fact that the service which is technical in nature can be said to be 'fees for included services' only when it has 'made available' technical knowledge or skills to the recipient of services, *i.e.* recipient of services can apply the same on his own. In the present case, the assessee had sent samples to the experts outside India and those experts submitted their report. There is nothing on record suggesting that the services rendered to the assessee were made available to it and the assessee was able to apply the same on its own. In the absence of the same, such service would not fall within the ambit of the 'included service'. Under these facts, there is no reason to interfere with the findings of the Commissioner (Appeals).
- In the result, appeal of the revenue is dismissed.