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Fee paid by stock broker for marketing services couldn't be held as FTS under India-UK treaty

Summary – The Kolkata ITAT in a recent case of Batlivala & Karani Securities (India) (P.) Ltd., (the Assessee) held that where assessee, a stockbrokers company, carrying on business of brokerage on behalf of institutional clients, made payments to its foreign subsidiary companies in respect of simple marketing services of introducing foreign institutional investors to invest in capital markets in India, since no technical service was being made available to assessee by its subsidiaries, payments in question could not be regarded as 'fee for technical services' liable to tax in India

Facts

- The assessee was a stockbroker company. It carried on business of brokerage on behalf of institutional clients. During the previous year relevant to the assessment year under consideration, the assessee had made payments to two of its wholly owned subsidiaries (UK) and B&K (Singapore) for providing marketing support services.
- The Assessing Officer took a view that payments made to subsidiaries companies amounted to fees for technical services liable to tax in India and, thus, assessee was required to deduct tax at source while making said payments.
- The Commissioner (Appeals) upheld the order of Assessing Officer.

Held

- It is apparent from the Article 12 of Singapore Treaty and Article 13 of the UK Treaty defining the term 'fees for technical services', the consideration paid for rendering of managerial, technical or consultancy services would be covered under the said definition only if such services make available any technical knowledge, experience, know how, or processes. The nature of services rendered by the subsidiaries to the assessee were in respect of simple marketing services of introducing foreign institutional investors to invest in capital markets in India so that the assessee would improve its business and income in India. No technical service was being made available to assessee by its subsidiaries and as a result, the payments made to subsidiaries would not fall within the definition of fees for technical services as admittedly no technical knowledge was made available to the assessee by the subsidiaries.
- Since the payment made by the assessee to its subsidiaries is not fees for technical services, then the same would be construed as only business income in the hands of the subsidiaries which would get taxed in India only in the event of existence of permanent establishment (PE) in India. The Assessing Officer had categorically stated in more than one place in his order that the Singapore and UK subsidiaries do not have any PE in India.

- As per Article 7 of UK and Singapore Treaty, in the absence of PE in India, the business income also would not get taxed in India. Hence payment made by the assessee to its subsidiaries is not chargeable to tax in India in the hands of the subsidiaries in India.
- In view of above, the Assessing Officer was to be directed to delete the disallowance made under section 40(a)(i) in respect of payments made to foreign subsidiaries.