

## Consultancy charges in nature of FTS would be taxable in India irrespective of situs of services provided by NR

**Summary – The Hyderabad ITAT in a recent case of Neuland Laboratories Ltd., (the Assessee) held that where assessee availed consultancy services and Assessing Officer treated same as technical services but since nature of services had not been determined, same could not be brought to tax in India**

**Disallowance made under section 40(a)(i) on payment of sales commission to agent was to be confirmed since assessee except making a claim that it was director's salary, could not furnish any other evidence to substantiate same**

### Facts

- The assessee-company was engaged in the business of manufacturing and trading of bulk drugs and intermediates. It entered into a master service agreement with its A.E. and availed consultancy services and paid charges.
- The Assessing Officer opined that only a few of the functions/services were to be rendered in connection with the management services agreement and many of the functions were required to be carried out in India by the said AE. Therefore, he was of the opinion that the services to be rendered were in the nature of technology services to be rendered in India and clearly fell within the meaning of the provisions of section 9(1)(vi) and 9(1)(vii) and, therefore, assessee was liable to deduct tax at source under section 195(2).
- The Commissioner (Appeals) confirmed the disallowance.
- On appeal:

### Held

- The assessee has made detailed submissions as to why the payment is not taxable in India and also as to why the TDS provisions are not applicable to the said payment and the Commissioner (Appeals) has not given any reason as to why he was not accepting the assessee's contentions. When the assessee makes submissions on the nature of the services and also as to whether the services have been rendered in India, it is the duty of the authority to consider and verify the veracity of the same, before coming to any conclusion as to taxability of the same in India. Before bringing to tax any income, the nature of the income has to be determined and only on the basis of such conclusion can the income be brought to tax in India. If the payment of consultancy charges are in the nature of 'fees for technical services' or 'royalty', then it would be taxable in India irrespective of the *situs* of the services. But if it is business income of the recipient, then even if it is earned in India, it would be taxable only if the recipient has a PE in India. It is also to be seen that where the provisions of DTAA are applicable to an assessee, then *i.e.* Income Tax Provisions or the DTAA whichever are beneficial to the assessee are to be made applicable. None of the authorities below

has gone into the exact nature of the services and also as to whether the services have been rendered inside or outside India. Without determining the nature of the services, same could not be brought to tax in India and the TDS provisions under section 195 of can be made applicable. In view of the same, it would be fit and proper to set aside the findings of the Assessing Officer and to remand the issue to the Assessing Officer for *de novo* consideration in accordance with law.