

Payment made for administrative services couldn't be held as 'FTS' under India-UK treaty

Summary – The Delhi ITAT in a recent case of Foster Wheeler (G.B.) Ltd., (the Assessee) held that where applicant a UK based company, in order to carry out contract for rendering engineering design services in connection with an Indian Oil refinery, availed certain administrative services from its sister concern which do not make available any technical skill or knowledge to its employees, payments made for said services cannot be regarded as fee for technical services

Facts

- The appellant, a UK based company, is an international engineering construction and project management contractor. It has been awarded a contract by IOCL for rendering construction support services, procurement services and engineering design services in connection with a refinery located in India.
- In order to carry out the project, applicant has availed of various support services such as account receivable, human resources, and payroll management, tax support and administrative support *etc.* from its sister concern FWEL.
- The applicant's case is that services rendered by third party service provider, *i.e.*, FWEL do not make available technical knowledge, experience, skill, know-how *etc* and, accordingly, payments towards the same cannot be considered as fees for technical services and is not taxable in India.
- The department on the other hand relying on invoices issued by FWEL which describe the category of services as 'consulting engineering services', has taken a plea that payments for said services are in the nature of fee for technical services.
- The department has further pointed out that it is admitted by the applicant that the persons whose names appear in the time-sheets are in fact engineers which further buttresses the department's stand that the services rendered are in the nature of engineering services which are technical in nature satisfying the 'make available' clause of the India-UK DTAA.

Held

- It is noticed from records that:—
 - (a) The affidavit given by the applicant clarifies that the reference to time spent by engineers in the sample invoice are its own engineers deputed in India PO and not any engineers of FWEL, and hence no engineering services were rendered by FWEL. The affidavit further clarifies the reason for reference to time spent by its engineers is because the cost incurred by FWEL is allocated to various group companies across the globe who avail of similar services from FWEL.
 - (b) The mention of 'engineering service' on the invoice is merely for the purpose of identifying the project to which the support services relate to. Further, names of engineers appear on the

annexure to the invoices as the chargeable hours worked by the engineers on the Indian project form the basis of charging the project for the support services.

- (c) The services rendered by third parties and FWEL are administrative support services rendered from abroad and are in the nature of 'managerial services'. Such services do not make available any technical skill, information or knowledge to the employees of applicant deputed in the India PO.
- As regards payments made to third parties other than FWEL, there is no dispute. In respect of FWEL, the applicant has filed an affidavit explaining the nature of services and according to this detailed affidavit services are not in the nature of fees for technical services as they do not satisfy the 'make available' clause. The mention of 'engineering services' on the invoice has also been explained as above and if this is true the same cannot satisfy 'make available' clause as these are not providing services on the basis of which the recipient can be said to acquire skills of enduring benefit nature. Department's reliance on the fact is also based on presumption that invoices have been prepared for the purpose of services-tax law and the description on the invoice is in the light of the definition of taxable service in service-tax Act. However, the affidavit filed does not say so. One cannot go on presumption of the department and therefore relying on the affidavit, it is ruled that services provided by FWEL and other third parties are not in the nature of fees for technical services.