Payment made to UK based company for consultancy charges for rendering designing services rightly treated as 'FTS'

Summary – The Delhi ITAT in a recent case of Mira Exim Ltd., (the Assessee) held that Payment made to a foreign company for legal services outside India by assessee fall under category of Independent personnal services taxable in respective foreign country

Payment to U.K based company for rendering designing services, was nothing but FTS

Facts

- The assessee had made payments in foreign currency to some companies under the head Legal & Professional expenses. The assessee stated that the payments in foreign currency were towards services rendered outside India and the payments had been made outside India. It was further stated that services involved being business profits of non-residents were taxable in their home countries and, therefore, TDS was not applicable thereon.
- The Assessing Officer rejected the explanation of the assessee. Regarding payment to LLP Canada, the Assessing Officer held that as per respective DTAA between India and Canada, professional fee paid for legal services to individual and firm was not taxable. In this case, payee was a company and, hence, TDS should be made. On consultancy charges paid to Martin, Germany, the Assessing Officer held that such charges were included in 'technical services' as defined in DTAA between India and Germany which was taxable and TDS was applicable. Similarly, amount paid to Huntswood was also covered under DTAA and TDS was applicable. Basically, Assessing Officer had treated all the payments as FTS and, hence, TDS was applicable.
- The Commissioner (Appeals) confirmed the additions.
- On appeal :

Held

Payment made to company in Mauritius and Canada

- As regard Rs.8,552 paid to Abacus Management Solutions a professional consultancy firm at Mauritius for advice from Mauritius relating to wholly owned subsidiary, being business income of non-resident, as per DTAA, it is taxable in Mauritius not in India. Disallowance of Rs.72,680 paid to Macera has been made on the ground that the payee being a company article 14 of the DTAA between India and Canada is not applicable and hence TDS was deductible. As borne out from the name of the non-resident payee, the payee is an LLP and not a company. The payee is a firm of barristers and solicitors which provide patent & trade mark services. The services being in respect of professional services from lawyers, article 14 of the DTAA with Canada will apply. The services were

© 2017, Tenet Tax & Legal Private Limited

rendered outside India and the payments were also received outside India and payee had no fixed place of business or PE in India. The payee is a LLP *i.e.* Limited Liability Partnership also called firm. The payee is not a company. Basis of disallowance by Assessing Officer is that the payee is a company. As payee is not a company but a firm, as per Assessing Officer herself, the payment is covered under article 14 as Independent Personal Services in accordance with which they are only to be taxed in Canada. Even if the payments are considered under business profits (Article 7 of DTAA) , the subject payment is not liable to TDS as the payee has no PE in India. Erroneous disallowance has been made by wrongly invoking section 195 and section 40(a)(ia).

Payment made to German Company

- As regards payment of Rs.6,46,300 to Martin, Germany, the assessee submitted that the marketing services involved cannot be FTS either under the Act or under the DTAA because no managerial or technical consultancy services were provided by the foreign payee. Services for arranging business meetings with importers outside India do not involve any management, technical or consultancy service which may be in the nature of FTS. It is evident that for a particular stream of income to be characterized as 'fees for technical services', it is necessary that some sort of 'managerial', 'technical' or 'consultancy' services should have been rendered in consideration. The terms 'managerial', 'technical' or 'consultancy' do not find definition in the Income-tax Act, 1961 and it is a settled law that they need to be interpreted based on their understanding in common parlance. The assessee further submitted that the services involved were rendered outside India in the course of business of the payee for which the payments were made outside India. No technology is involved in the said business support services and, moreover, no technical knowledge or knowhow was made available to the assessee. Services being rendered in the course of business of the payee in its home country are in the nature of business profit covered under article 7 of the DTAA and there being no PE in India of the payee, the subject payments are not taxable in India. The payment involved relates to services provided by the payee for arranging business meetings outside India with foreign buyers with the assessee. The services towards arranging business meetings with foreign buyers are only marketing services like services provided by foreign agents for procuring export orders for which export commission or retainer is paid. The payments involved are purely business profits covered under article-7 of the DTAA with Germany. The expression "professional services" in article 14 of the Agreement for Avoidance of Double Taxation between Germany and India is wide enough to include services, if any, rendered by the assessee as an engineer and marketing consultancy services rendered by the assessee were in the nature of professional services falling under article 14 of the Double Taxation Avoidance Agreement between India and the Federal Republic of Germany. The conditions mentioned in the said article were clearly satisfied, as there was no permanent establishment in India in the facts and circumstances of the case. The professional fees and fee for independent personal services receivable by the assessee were not taxable in India. Where an individual (who is not a salaried employee) renders independent, personal services in the foreign

© 2017, Tenet Tax & Legal Private Limited

state, then such independent personal services are covered by article-14 whereby they would only be taxable in the foreign state where the independent individual is resident. So in this case, the payee who is rendering such professional or independent personal services was only taxable under article-14 in Germany where he is resident. The payment has been made to foreign payee abroad for the services rendered outside India. Since income itself was not chargeable to tax in India, there was no liability of the assessee to deduct tax under section 195(1) and hence section 40(*a*)(*ia*) is not applicable.

Payment made to U.K based Company

- On payment of Rs.12,49,474 to Huntswood, London the assessee submitted that this is a payment for consultancy charges towards Designing services provided to the assessee outside India. The consultancy services involved were in relation to information concerning designs and patterns of readymade garments available in the foreign market. The nature of payment made to Huntswood does not qualify to be exempted under the category of services under DTAA. In this case, the foreign payee is providing designing services which is nothing but technical services as defined under DTAA between India and UK. Thus, the addition of Rs.12,49,474/- has rightly been confirmed by the Commissioner (Appeals).

© 2017, Tenet Tax & Legal Private Limited