Sum paid to Singaporean Co. for rendering global support services not taxable as per Article 12: Mumbai ITAT

Summary – The Mumbai ITAT in a recent case of ExxonMobil Company India (P.) Ltd., (the Assessee) held that where assessee paid certain amount to a Singapore based company for providing global support services which included management consulting, functional advice, administrative, technical, professional and other support services since foreign company had not made available any technical knowledge, experience, skill, know-how, or process which enabled assessee to apply technology contained therein on its own, payment made by assessee could not be considered as fees for technical services as defined under article 12(4)(b) of India-Singapore DTAA

Where assessee was rendering ITES services to AE, a company which was basically a diagnostic lab earning income from scanning, could not be accepted as comparable

In case of assessee rendering ITES services to AE, a consistent loss making company was not acceptable as comparable

Where assessee was rendering back office support services to AE, a company engaged in KPO services was not acceptable as comparable

Where assessee was providing back office support services to AE, a company which outsourced its entire work to third parties and thereby followed a different business model, could not be accepted as comparable

Facts

- During the relevant previous year, the assessee had paid certain amount to 'EMCAP', Singapore, towards global support service fees. The assessee did not deduct tax at source while making said payments.
- The Assessing Officer opined that the payment made by the assessee was in the nature of fees for technical services as defined in *Explanation* 2 to section 9(1)(vii), as EMCAP has rendered services of highly technical nature involving drawing and research. Therefore, the assessee was required to withhold the tax while making such payments. Since the assessee failed to deduct tax at source while making payments in question, the Assessing Officer disallowed same.
- The DRP confirmed the disallowance made by the Assessing Officer.
- On appeal

Held

- It is evident that while disallowing the amount in dispute under section 40(a)(i), the Assessing Officer has held that the payment made by the assessee to EMCAP towards Global support services is in the nature of fees for technical service as defined under *Explanation* 2 to section 9(1)(vii). It is also relevant to note, under article 12 of India Singapore tax treaty, fees for technical services, though, is taxable in the hands of the recipient in Singapore, however, it can also be taxed in India under certain circumstances. Applying the said provision, it is necessary to determine whether the payment made can at all be termed as fee for technical services as defined under article 12 of India Singapore Tax Treaty.
- The Assessing Officer has treated the payment made as fees for technical services on the reasoning that under the agreement EMCAP has made available managerial and technical services to the assessee. The expression 'make available' which also appears in article 12(4)(b) of the India-US tax treaty would mean the recipient of such service is able to apply or make use of the technical knowledge, know-how, *etc*., by himself in his business or for his own benefit and without recourse to the service provider in future and for this purpose a transaction of the technical knowledge, experience, skills, *etc*., from the service provider to the service recipient is necessary. Some sort of durability or permanency of the result of the rendering of services is envisaged which will remain at the disposal of the service recipient.
- In other words, the technical knowledge, experience, skill, *etc*., must remain with the service recipient even after the rendering of the services has come to an end. In contrast to article 12(4)(b) of the India-US tax treaty, article 12(4)(b) of India-Singapore tax treaty has made it more specific by providing that technical knowledge, experience, skill, knowhow or process, would not amount to fees for technical service unless it enables the person acquiring the service to apply to technology therein.
- A perusal of the agreement between the assessee and EMCAP makes it clear that as per the terms of the agreement EMCAP would provide management consulting, functional advice, administrative, technical, professional and other support services to the assessee either itself or through any affiliate or through third parties. However, there was nothing in the agreement to conclude that in the course of such provision of service, EMCAP had made available any technical knowledge, experience, skill, know-how, or process which enabled the assessee to apply the technology contained therein on its own without the aid of EMCAP.
- A careful analysis of the observations of the High Court in *CIT* v. *De Beers India Mineral (P.) Ltd*. [2012] 21 taxmann.com 214/208 Taxman 406/346 ITR 467 (Kar.), makes it clear that 'make available' not only would mean that recipient of the service is in a position to derive an enduring benefit out of utilisation of the knowledge or know-how on his own in future without the aid of the service provider but such technical knowledge, skill, know-how, *etc*., must remain with the recipient even after the contract comes to an end. The Court has observed, the technology will be considered to have been made available when the person acquiring the service enable him to apply the technology.

- Further, the Court went on to hold that the payment can be considered as fees for technical services only if the twin test of rendering service and making technical knowledge available at the same time is satisfied. If the aforesaid tests laid down by the High Court are applied to the facts of the present case it becomes clear that it has not been established on record that while rendering the services, EMCAP has made available technical knowledge, know-how, skill, *etc*., to the assessee in a manner to enable him to apply them independently or on its own. Therefore, the payment made by the assessee could not be considered as fees for technical services as defined under article 12(4)(b) of the India-Singapore tax treaty and for this reason there is no need to examine taxability of the same under section 9(1)(vii).
- Moreover, it is a fact on record that the payment of global support service fee was made under the agreement which has continued from the year 2003. It is a matter of record that in the preceding assessment years though the assessee has paid global support service fees to EMCAP without deducting tax at source, no disallowance under section 40(a)(i) was ever made. Therefore, there being no difference in facts in the impugned assessment year, considering that the payment was made under the same contract, even, applying the rule of consistency, no disallowance under section 40(a)(i) can be made in the impugned assessment year. Accordingly, the disallowance made by the Assessing Officer is deleted.