No FTS if no technical knowledge was made available to enable recipients to use services independently

Summary – The Delhi ITAT in a recent case of Inspectorate International Ltd., (the Assessee) held that where inspection and testing services rendered by assessee a UK based company to Indian customers but no technical knowledge, etc. were made available so as to enable recipients to use those services independently, payments received could not be termed as 'fee for technical services'

Facts

- The assessee-company, a tax resident of UK, was principally engaged in the business of providing inspection and testing of wide range of commodities of metal and mineral, oil and petro chemical. It was eligible for the benefit of Indo-UK DTAA. It was claimed that customers of the company in India appointed the assessee at a principal to principal basis to provide certain inspection and testing services. The assessee provided these services mostly outside India. During relevant year, the assessee received certain sum from customers in India towards these services.
- The Assessing Officer held that income was chargeable to tax according to the Income-tax Act, 1961 under section 9(1)(*vii*)(2) and further as per article 13 of the DTAA, it was chargeable to tax as technical services.
- On objections being raised by the assessee, the DRP issued direction holding that the Assessing Officer had considered all the arguments of the assessee. It was further held that there was no error in the order of the Assessing Officer in holding that the assessee's services satisfy the make available test and therefore, the decision of the Assessing Officer was justified. Consequently, final order was passed by the Assessing Officer taxing the sum received from customers in India as fees for technical services.
- On appeal to Tribunal:

Held

- There is no dispute between the parties that the sum so received is chargeable to tax according to the provisions of domestic tax laws. Therefore, only issue to be examined is whether the above sum can be taxed in India as per the articles of Indo-UK Double Taxation Avoidance Agreement. The claim of the assessee is that above sum is chargeable to tax as fees for technical services as per article 13(4)(*c*) of DTAA if the assessee makes available technical, knowledge, experience, skill etc to the Indian entities. The Assessing Officer has agreed that the services provided by the assessee are technical in nature. According to him as the assessee is also carrying analysis, testing and inspection, hence, it is providing the consultancy services also. He therefore, held that on close scrutiny of nature of services the service recipient get equipped to carry on that business model or service model on their own without reference to the service provider. Therefore, according to him such services fall within the ambit of making available technical knowledge under the tax treaty. The

Dispute Resolution Panel also agreed with the order of the Assessing Officer and accordingly, sum received of Rs. 187.7 lakhs was considered as fees for technical services. Now coming to the nature of services rendered by the assessee to the various entities, the assessee has provided services to Hindalco Ltd. and the nature of services is umpire instruction based on which a certificate of Umpire Analysis was given. For the certification, different methods such as F25, G18, I18, i20 and I23 were employed. It also certified the state of material and element of such certification. The other service rendered to Hindalco Industries Ltd. is with respect to weighing, sampling the moisture determination services. After providing these services a certificate of inspection was also provided. The service provided to Grifith India also involved chemical analysis of different products and then providing a certificate thereof. The services of Indian Oil Corporation is inspection of the vessel on arrival. The services provided to Dell International is also with respect to data security audit and auditing. The services provided to Nirma was also with respect to the certificate of analysis of various parameters of spent pacol catalyst. The services provided to Vedanta Ltd. is also pertaining to chemical certification of material. Undoubtedly all the above services provided by the assessee are in the nature of technical analysis and unless the assessee is able to perform those services independently without the help of the service provider then only it can be said that services have been made available by the service provider to the service recipient. According to article 13 of Double Taxation Avoidance Agreement the fees for technical services can be chargeable to tax in India only such services are made available to the recipient of such services. However, the assessee has not at all made available any such services to the Indian entity but has merely provided the services in the ordinary course of its business. The revenue has not brought on any material to show that subsequently the recipient of those services have performed these services on their own without the help of the assessee or any other similar service provider. Inspection and survey of imported/exported cargo and certifying in relation to the quality and price, provision of such services does not make available technical knowledge, experience, skill, know-how or processes to the recipient of the service. Hence, the fees for technical services earned by the assessee is not chargeable to tax in India according to article 13(4)(*c*) of the DTAA as these services are not made available to the Indian parties. Accordingly, it is held that Rs. 187.72 lakhs received by the assessee is not chargeable to tax in India.